

**LARGE AND GREY: WHALES, ELEPHANTS,
AND INTERNATIONAL
LAW AND POLITICS**

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Abstract

This thesis is an investigation into, and a gathering of evidence on, the various ways in which two iconic species, whales and elephants, and the two conventions which govern their management, the 1946 International Convention for the Regulation of Whaling (ICRW) and the 1973 Convention on International Trade in Endangered Species (CITES), are linked in international law and politics.

After explaining the nature of international conventions governing wildlife species generally, the respective histories of the two conventions are considered: first, that of the ICRW is considered, together with its strengths, weaknesses and current position; after which a similar assessment is made of CITES. The history of linkage between the two is considered, including attempts made to use the one to undercut the other.

Various aspects of the protection, use and management of the two species are then canvassed; and it is shown how important political actors hold apparently mutually exclusive views. Throughout, the position of South Africa is particularly considered.

The importance of protecting biological diversity is then considered, together with the potential harmonising role of the 1989 Convention on Biological Diversity (CBD), and the political stances of various countries, together with ongoing analysis of efforts to effect change. The natures of whales and elephants as symbols, and as special animals, are then considered.

In conclusion, it is explained that both treaties could work if the political drive was present - but that this is currently absent, and the environment is suffering whilst politicians argue over the best courses to follow to protect natural resources. It is suggested that the reason that the arguments in respect of whales and elephants, the ICRW and CITES, are so bitter is because so much is at stake - for the fight on this battleground is not simply about the particular species, but the course the world as a whole should follow in all of its use of natural resources.

Understanding the links between species and between treaties helps us to understand alternative possible courses. By exploring one such set of links that has not previously been analysed, the research presented in this thesis is intended to make a contribution to that understanding (both internationally and within South Africa).

Large and grey: whales, elephants, and international law and politics

Ed Couzens

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**Thesis submitted for the degree of Doctor of Philosophy in the Faculty of Law,
University of KwaZulu-Natal**

Thesis title:

“Large and grey: whales, elephants, and international law and politics”

Declaration

I hereby certify that the contents of this thesis are entirely my own work, except where I have indicated to the contrary; and that neither the whole nor any part of this thesis has previously been submitted toward any degree.

Edmund William Franz Couzens
December 2008

4.2 Each copy of the thesis must be signed and dated by the student and supervisor.

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Date: **December 2008/September 2009**

Professor M A Kidd

Faculty of Law, University of KwaZulu-Natal, Pietermaritzburg

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Date:

September 2009

Edmund William Franz Couzens

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1 Introduction 1

1.1 The aims of this thesis 1

In these opening paragraphs, the point of the thesis is explained as being to investigate and discover connexions between whales and elephants in international law and politics - and to reveal links between the species and the two multilateral environmental agreements which are used to regulate their protection and use in international law. In particular, the way in which parties have attempted to use one of these treaties to undermine their opponents' position at the other treaty is considered. These links are considered in the context of the ongoing efforts to shape the philosophy of the use of natural resources which the world will eventually adopt. This will hopefully make an original contribution to understanding of how best the world might utilise and protect natural resources.

1.2 The argument of the thesis 2

In seven key points, the argument of the thesis is set out.

1.3 The thesis in broad outline 2

Expanding on the seven key points made in 1.2, the thesis is explained.

1.4 Research methodology 5

The approach to writing the thesis is explained, together with an explanation of the different research techniques employed.

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2 Multilateral environmental treaties 10

2.1 Environmental treaties in the modern world 10

In this first sub-Chapter, the nature of multilateral environmental agreements (MEAs) is considered; along with some of the difficulties inherent in the creation and maintenance of functional treaties able to 'stand the test of time'. The ICRW and CITES are 'elderly' MEAs and are arguably showing themselves to be unable to cope with at least some of the ways in which international views on management of natural resources have changed. MEAs that are not originally designed with sufficient flexibility are ill-suited to having the views of their parties change - sometimes even to the extent that their parties hold positions the opposite of those with which they began. This would not be a problem if all parties were to change their minds similarly; but where some parties insist that the MEA continue to function as originally intended, and others to insist that it has changed or must change, conflict arises. In the case of the ICRW, the conflict has become so great that it is almost impossible to conceive of replacing the MEA - it would be too difficult to reach agreement on a future treaty. We therefore limp on as best we can with what we have. The ICRW is an MEA that often seems to stand on its own - other, more recent, MEAs tend not to be 'single issue' treaties. The question then arises whether the ICRW ought to be, if it can be, brought under the 'umbrella' of a wider conservation regime. This would be difficult as, instead of seeking consensus, parties to the ICRW have tried instead to undermine their opponents by playing CITES off against the ICRW - or by using CITES to support their positions at the ICRW.

One might ask why the ICRW is not simply scrapped, or left to become dysfunctional, but it is argued in this thesis that the real importance of the ICRW lies in the reluctance of states either to leave it, or to reform it. Its importance lies in its status as a battlefield. What, then, is being fought for? It is the contention of this thesis that the prize is nothing less than the determination of the philosophy of human use of natural resources which will eventually be adopted by the majority of states. To understand the competing philosophies, both ‘preservation’ and ‘conservation’ are explained.

It is further contended that the battlefield is not merely the ICRW, but CITES also - and that potentially decisive battles are being fought with both whales and elephants, the two most iconic species the world knows, as subjects. More specifically, that neither of the two species, or either of the MEAs under which they are managed internationally, can be understood separately from each other in international law. That there are links in international law and politics between the two species and the two treaties is the basic problem which this thesis sets out to prove; and which, to the best of the present writer’s knowledge, no other researcher has ever tried to do.

2.2 Environmental treaties generally 16

In the short second sub-Chapter, the general nature of international treaties is considered in order to provide a solid basis for understanding many of the issues dealt with in the thesis. The issue of whether states generally obey international law or not is considered; as well as how the interpretation of treaties is traditionally expected to be approached.

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In the absence of a considerable body of international case law, jurists make much of the few cases - or arbitrations - which we do have. The precedent value of the *Bering Sea Fur Seals Arbitration* is immense - as it set the scene for accepted status of the high seas as ‘open access’ areas. The scene was therefore set for lack of control over fisheries generally, which lack of control persists; and over whaling, which resulted in incredible damage being done to most of the great whales, to the creation of the ICRW, to the eventual ‘moratorium’ on commercial whaling, and to the current controversy. Knowledge of the arbitral ruling is therefore essential for understanding the history of whaling and fishing.

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Further essential historical understanding can be found in the London Convention of 1900, the Paris Convention of 1902, and the London Convention of 1933. These three Conventions make rigid distinctions between species - setting the scene for the approach adopted by both the ICRW and CITES. This approach, it is suggested, makes it extremely difficult to use elderly MEAs to protect species and biological diversity generally - in the face of our current, much improved, understanding of intra- and inter-species relationships, ecosystems, and biodiversity. As will become apparent later in the thesis, the writer’s contention is that as long as MEAs take a rigid ‘categorisation’ approach to different species, it will be nearly impossible adequately to safeguard species, their habitats and their ecosystems - and nearly impossible for any to function properly. This chapter therefore provides essential background material for the contention that one of the greatest problems facing the world, in respect of wildlife use and protection, is this ‘categorisation’ approach.

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The tactic used by the anti-whaling members, of bringing in new members to support their view, was then adopted by the pro-whaling members - and the IWC saw a period of rapid growth, with many states joining despite having no discernible interest in whaling. This 'numbers race' quickly led to deadlock. After various attempts by the pro-whaling states to overturn the 'moratorium' proved fruitless; this impasse then led to efforts by these states to broaden the ambit of the debate and to involve CITES. A deliberate tactic was apparently followed, by certain pro-whaling Parties, of trying to undermine the ICRW through downlisting motions at CITES. The years to come saw varied efforts being made to re-open commercial whaling; with each effort being stymied by the pro-whaling members. The relationship between the ICRW and CITES became particularly dangerous ground as the years went by and as CITES was used by the pro-whaling states to bring increased pressure to bear on the ICRW. Other tactics used, and difficult relationships which arose, included the issue of small-type coastal whaling and aboriginal whaling; and efforts to transform the nature of the ICRW. Many efforts by well-meaning states to bring the warring parties together failed. Political manoeuvring came to dominate the plenary sessions, and to a lesser extent the scientific sessions, of the IWC.

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At the conclusion of the Chapter, at the time of writing in mid-2008, there seems to be little immediate prospect of bringing the impasse to an end. IWC members remain apparently locked into one camp or the other, with little room for middle ground. Parties who try to sit on the fence risk alienating both friends and enemies. Most

parties continue to complain and to express discontent with the situation. The possibility is also considered, however, that many parties might in fact be relatively content with the status quo and that this might make it difficult for the impetus to be found for resolution.

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In this Chapter the creation of CITES was considered, along with differing perceptions of what its purpose is. CITES is clearly a more modern treaty than is the ICRW - and is also a far better subscribed treaty, with a majority of the world's states being Parties. CITES does, however, face considerable difficulties - in particular, its limited scope (having no jurisdiction within the sovereign territory of its Parties); and its ability to monitor and enforce compliance with both its provisions and its resolutions.

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Although the idea of bringing poaching and the illegal ivory trade to an end by giving elephants complete protection from commercial trade might seem an obvious one, it took a long time for the idea to be accepted. Eventually, however, a combination of Western consumer pressure and a switch of stances by East African range states persuaded a majority in CITES to list the elephant on Appendix I. This occurred, however, against the arguments of the Southern African range states; and occurred against a backdrop of political manoeuvring and hypocrisy.

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The Appendix I listing was almost immediately more successful than its supporters had hoped it would be in curtailing poaching - and arguably shows that CITES is a treaty which can operate extremely successfully. On the other hand, this success came at the price of the dissatisfaction of the Southern African range states; and these states quickly began to seek ways to ameliorate their loss - particularly by initiating moves to have their own elephant populations downlisted.

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Since the elephant was first listed on Appendix I of CITES in 1989, the Southern African range states have protested bitterly that they are prejudiced by the decision, and that it was a political and not a scientific decision. Clearly, though, the Appendix I listing did much to slow the trade and to stem the poaching - something that the quota system in place prior to 1989 had never been able to do. At COP 10 in 1997, however, certain Southern African states managed to achieve a qualified downlisting; and have managed to make further inroads into the Appendix I listing in the 21st Century. This result has been achieved through many different arguments and pressure tactics; and in the face of much opposition from India, range states in East and West Africa (Kenya, in particular), and Western states. Arguably, the process has also seen increasing acceptance world-wide of the philosophy of sustainable use - including consumptive use - to the extent that the state, Tanzania, which originally proposed the Appendix I listing in 1989 has proposed (although this was subsequently withdrawn) trading its ivory. Poaching, however, although it has slowed, has never been brought to an end - and remains an ongoing, perhaps even an increasing, problem.

A notable feature of the evolution away from the complete ban, described above, has been the extent to which the destinies of whales and elephants have been brought together in the international arena. At CITES COPs, there have been apparent trade-off efforts, efforts to undermine or isolate positions at the other MEA, and efforts to streamline wildlife management philosophies. These initiatives are touched upon in this Chapter.

In the middle of 2007, at CITES COP 14, a significant step was taken which largely represents a compromise arrangement between opposing African states - a legal trading of stockpiles, followed by a moratorium period of almost a decade. That a compromise was reached is of great significance, considering how entrenched the positions of the opposing parties, and especially the opposed groups of African range states, had appeared to be.

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Having considered the histories of the management of, respectively, whales and elephants in international law, Chapter 5 turned its attention to specific links between the species. In a sense, this Chapter is arguably the crux of the entire thesis; with the case being made that certain pro-whaling states deliberately tried to shift the debate from the ICRW - which they may have seen as being deadlocked, and possibly beyond salvation - to CITES.

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At the same time as understanding the linkages outlined, it is important to understand the extent to which the debate over how best to utilise wildlife generally has shifted - with terminology changing and new understandings of the complexity of ecosystems being argued for. This has made the debate far more complicated than a mere choice between 'using' and 'not using'. The argument that there are 'too many whales', and that humans need to use them, mirrors the argument that there are 'too many elephants' and that elephants must 'contribute to their own survival'.

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In this short, but vital, chapter, it is explained that there are radically different approaches which can be taken to conservation - and that both of these can be epitomised by the whale and the elephant. It is considered, further, that views worldwide might be shifting.

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Scientific understanding, obviously, is increasing at a rapid rate. The history of scientific research into whale populations has, however, a somewhat sordid history of having been abused by ICRW/IWC members to support their own positions; and of having been consistently ignored by the IWC itself. In the early to mid 1990s it did, for a while, appear as though rapprochement between the warring sides might be possible with the adoption of a Revised Management Procedure (RMP) which takes almost extraordinary cognisance of the need for caution. However, implementation of the RMP became bogged down in squabbles over the Revised Management Scheme (RMS) which was considered necessary to provide oversight. At present time of writing, there is virtually no movement on this; and the pro-whaling members are arguing that, no matter what they do, the anti-whaling members will have no intention of ever allowing commercial whaling to resume.

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Scientific research into whaling, particularly into populations statuses, has always been recognised as an essential feature of the work of the IWC. Since the coming into effect, in 1985/86, of the 'moratorium', however, whaling under scientific permit has taken on increased importance. It has become something of a mantra amongst anti-whaling parties, and other anti-whaling forces, that Japanese research whaling is 'bogus' and designed rather to keep the market for whale meat thriving. In the absence of a body, the equivalent of an upper court in a national legal system, with the jurisdiction in international law to make such a finding, however, it remains impossible to state conclusively that the 'scientific permit exemption' is being abused. The 'jury is equally out' on whether the scientific research which the Japanese undertake represents genuine scientific research or not.

'Research whaling' remains probably the biggest bone of contention between the pro- and anti-whaling members. On the other hand, that Japan can continue to take substantial numbers of great whales annually despite the 'moratorium' may well be a factor contributing to a certain sense of stability - as long as it is able to use this 'loophole' Japan does not have a real incentive to leave the ICRW, a move which could potentially cause the treaty to collapse.

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There are some possibilities that frustrated pro-whaling members might eventually decide to leave the ICRW - one of the most significant such possibilities coming in the form of the creation of NAMMCO, which has the potential eventually to become a regional rival to the IWC. At present it seems unlikely that this will happen; but, should the ICRW collapse, it seems to the present writer more likely that it would be replaced by a number of regional instruments than by another single-issue, umbrella-type MEA. NAMMCO was discussed here because it seemed important for the thesis to consider at least one of the various regional treaties concerned with management of cetaceans (ASCOBANS and ACCOBAM being two others), given the possibility (considered later) of what might happen were efforts to be made to bring the warring parties together under one umbrella-type treaty.

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When considering what it is that keeps Japan in the IWC, it is important to consider why Japan did not object - as Norway did - to the 1982 zero quota. The most likely explanation seems to be that Japan feared being barred from fishing in US waters. The US has national legislation which entitles - arguably even requires, in certain circumstances - the country to impose this sanction; or to refuse to allow imports from a country on which it has imposed this sanction. On several occasions the US has used, or threatened to use, such sanctions - leading to accusations that the country abuses its economic and political might - but the reality is that when it has come 'to the crunch', on whaling, the US has usually backed away from exercising its full powers under the legislation. Understanding of the US's role, and of its relationship with Japan, is important for understanding of the IWC.

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It is important to understand that international law and national programmes necessarily affect each other, and that it would be artificial to pretend otherwise. By way of illustration, a national programme is considered. If poaching is ever to be curtailed and a legal trade to prove successful in returning funds to conservation, then it is necessary that communities in range states be offered alternatives - given incentives that will make the illegal trade unattractive, and which will promote improved understanding of biological diversity. At the same time, states which are not range states and yet which wish to make decisions that affect people within range states need to understand the consequences of their decisions for the 'range people'. Probably the most famous example of a natural resource use programme which seeks to find a balance between the needs of 'range people' and the international community is the Zimbabwean CAMPFIRE programme. After apparently running successfully for some years, and both inspiring and influencing similar schemes in other parts of the world, CAMPFIRE has now collapsed in the general turmoil of Zimbabwe's economic, political and social collapse. The manner of its collapse obscures the lessons that might have been learned had the programme run its course.

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Having inspired the world once with the CAMPFIRE programme, the Southern African region might now be doing so again - exporting the idea of the transfrontier conservation area. It is still too early to know whether the TFCA concept will be successful or not, although the signs are promising - and increased international cooperation in the conservation of wildlife is unlikely ever to be altogether a bad thing. It is important to understand also that one of the most important reasons why elephants and whales are such important icons of conservation, and why the battles over them are fought so bitterly, is because it is possible to argue coherently that neither species is truly endangered. This is why there is a debate - were the species on the point of extinction, there would not be a debate over whether to use them consumptively or not.

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The 1989 Appendix I listing of the elephant was an initiative of East Africa, and was achieved despite the opposition of the Southern African region. This position largely persists today, with the competing philosophies of 'preservation' and 'conservation' being at issue in respect of elephants - Kenya, on one hand, tries to have no consumptive use of wildlife at all; while South Africa, on the other hand, promotes this. There are, of course, arguments to be made for both sides; and eventually middle ground will need to be found. The two countries may, however, not be as far apart as they presently seem to be - they reached a compromise at CITES COP 14; and are the only two African countries which have historically supported the anti-whaling bloc at the ICRW.

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In this Chapter, aboriginal subsistence whaling (ASW) is considered generally - as is Japanese small-type coastal whaling (JSTCW).

It has been accepted throughout the history of the ICRW that ASW ought to be exempt from the restrictions placed on so-called commercial whaling. This has, however, led to many disputes - especially over whether to consider JSTCW as akin to ASW; and whether to allow ASW to utilise species of whales with small populations. It has led also to some crucial difficulties for the US, which has played a leading role in the anti-whaling movement; but which has never itself ceased to be a whaling country. This may have led the US into making a number of concessions which it might not otherwise have made.

In particular, the events of IWC 54, held in Shimonoseki in Japan, and then the inter-sessional meeting in Cambridge in the UK, are considered - two meetings from which neither Japan nor the US emerge with credit.

ASW is an extremely important topic for research as, although not directly relevant to the links between elephants and whales, the ICRW and CITES, it is arguably the issue which has brought Japan and the United States toward consensus that they should work together - and this cooperation is what is most likely eventually to resolve the impasse within the IWC. Further, understanding the issue is crucial for understanding the way in which the IWC functions.

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Whales and elephants stand on different footings, in the sense that the former belong to an 'open access regime' and the latter are within national sovereignty. Nevertheless, there is a cogent argument to be made that, despite this obvious difference, their destinies are mingled and many of the same sovereignty issues arise in respect of both. Understanding this helps understanding of international wildlife law generally.

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In any discussion of regulation of the utilisation of natural resources, it is important to have an awareness of the problem encapsulated by Garret Hardin in his seminal essay 'The Tragedy of the Commons', in which he postulated that wherever there is unrestricted access to a 'commons', there will be an incentive to abuse this - and that this will inevitably lead to a collapse of the resource. Arguably, all wildlife-related international MEAs and regimes are in place to deal with this problem.

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As much as the Parties to the ICRW wish, for their various reasons, to keep what is almost certainly the world's most dysfunctional MEA to itself, it is ultimately impossible to divorce consideration of whaling from what, in the present writer's view, is one of the greatest tragedies of all time - the selfish, shortsighted, and almost complete destruction of the oceans as a set of properly functioning ecosystems. The imminent catastrophe of the worldwide collapse of the oceans' ecosystems bears directly on the whaling issue for many reasons.

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Moving (ironically) from one of the world's worst examples of shortsighted and unethical disregard for the future, to the faltering efforts being made in international law to deal in the future with this disregard, this Chapter considered the status of the 'precautionary principle' in international law - and its applicability to the matters under discussion. As the principle increases in importance in international law, so might protection of the environment generally. Full acceptance of the principle might even serve eventually as a way to reconcile opposed parties.

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Much of the debate over which utilisation philosophy to adopt depends on the value which protagonists place on species. This is a fraught issue, as it is virtually impossible to set monetary values to many of the key features of the species for which we make decisions.

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South Africa's usual pro-sustainable (consumptive) use of wildlife is arguably at odds with its anti-whaling stance. Precisely what South Africa's policy is is not entirely clear - it cannot be, as this is not publicly disclosed. Through interviews with various important role-players and commentators, however, an effort is made to discern this policy - and to consider its consistency with South Africa's policy on the use of elephants.

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South Africa is a Member of two significant regional instruments dealing with enforcement - the Lusaka Agreement on enforcement of conservation laws and the SADC Protocol on the conservation of wildlife and enforcement of conservation laws. The two Agreements have markedly different histories and, arguably, approaches, but both are of direct relevance to the international management of the ivory trade.

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If the opposed camps in the 'preservation' versus 'conservation' war are ever to be brought together, there will need to be middle ground found between the perceptions which each camp holds of the value of nature. At present, it seems unlikely that there will be agreement reached any time soon - so vast are some of the differences.

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Leaving aside the European Union, there are two states which dominate current international debate over the use of natural resources - the United States and Japan. The US has a strange position. From having been the driver of many of the important MEAs of the early 1970s, it has now arguably squandered its moral capital and become a political polecat in the international livingroom. Despite this, the country remains hugely powerful politically and economically, and it is seen by many as the one country which could, if it chose, bring other warring parties together.

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The other state which has global reach, and which is of major significance in the war over the philosophy of use of natural resources which the world will eventually adopt, is Japan. Japan has a very poor international environmental reputation. This reputation may not be altogether deserved; but certainly Japan is currently a destructive force to natural resources in many parts of the world.

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On whaling, the US and Japan have mingled pasts - and probably mingled futures too. Understanding their relationship, past and present, is likely to provide clues to the future.

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Little more than 50-100 years ago, states parties to international conventions were classifying certain species as 'noxious' and recommending their extermination. It would be extremely dangerous for us now, only a little more than 25 years after adopting the first Convention to adopt an 'ecosystem' approach (CCAMLR), to claim that we now understand how nature works. Almost certainly, in 200 years' time, the scientists of the future will be mocking our lack of insight. Despite this, in the present writer's view, we continue to fail to recognise the importance, complexity and fragility of biodiversity.

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Arguably the most important step that we have taken - in international law - toward recognising the limits of our traditional 'categorisation of species' approach to our use and protection of wildlife is the adoption of the CBD. This is the first global convention to urge the protection not just of particular species but the protection of habitats and ecosystems in order to provide particular species with protection. The CBD is problematic - particularly because the obligations which it places on its Parties are very weak - but it is a giant step forward. Ultimately, it might well be under the banner of the CBD that the resolution to the 'preservation'/'conservation' conflict will be found. In the final chapter, in which recommendations for the future are made, the possible role of the CBD will be returned to.

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One of the most significant ways in which the CBD might come to play a vital role lies in the increased use of marine sanctuaries. Provided for in the original ICRW text, sanctuaries are not a new idea - but they have been underutilised. Probably this is because they have come to be seen by warring Parties as a political tool. Properly used, sanctuaries have the potential to provide the best scientific data for us to understand biodiversity.

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One of the most contentious aspects of the way in which the IWC currently operates is the frantic scrabbling for support which has seen numerous states with no apparent interest in whaling adhere to the ICRW. This has then contributed to the impasse in which the states parties now find themselves. The gulf between the two camps yawns extremely wide, and this can be seen in the fights over democratic principles as well as over the utilisation of whales. This conflict has become a feature of CITES COPs also. Although many of the new parties bring their own hidden agendas, lobby groups and political niche interests; one might hope that, ultimately, the broadening of membership will contribute to resolution.

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The landscape of the IWC is littered with failed efforts to broker settlement; and to find alternatives. Efforts remain ongoing - although somewhat sporadic. It is important that such efforts be continued, no matter how disheartening their failures might be for the parties who make them. Change and compromise remain possible; but for these to happen quickly is probably not. Parties need to act with patience and to build the foundations for eventual accord slowly.

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While it is possible that both elephants and whales have had their 'special natures' artificially inflated by the opponents of increased usage, it seems more likely that both species truly are as special as they appear to be - or perhaps even more so.

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It is no accident that elephants and whales have become the two iconic species of the world's environmental movements; and - indeed - a very battleground upon which the future of the way we live with animals might be decided. Both are remarkably complicated, sensitive and intelligent species. We have made incredible advances in our understanding of the complexities of animal behaviour, and of the ethics of our abuse, consumption, interactions with, management, stewardship, trusteeship, and use of animals; however, we still have a long way to travel.

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It is very important that one not try to understand the ICRW and CITES, and their relationship, without also paying attention to other MEAs - even where parties themselves deliberately avoid drawing such linkages. In this Chapter, examples were given of various MEAs, and of the WTO and UNEP, which have roles to play that affect the issues at hand. States parties, it seems, flirt continually with linkages - when it suits them to associate themselves with other MEAs they will, only to withdraw when such linkage is seen as inconvenient. The Secretariats of both the IWC and CITES cooperate with each other, and with other MEAs, but usually this is at the level of supplying scientific information and taking observer status.

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Large and grey: whales, elephants, and international law and politics

Ed Couzens

‘... all comparison in the way of general bulk between the whale and the elephant is preposterous ...; nevertheless, there are not wanting some points of curious similitude ...’

Herman Melville *Moby Dick*¹

1 Introduction

1.1 The aims of this thesis

The first aim of this Doctoral thesis is to investigate and discover what connexions there are between two particular multilateral environmental treaties - the International Convention for the Regulation of Whaling, and the Convention on International Trade in Endangered Species - and between whales and elephants, high profile species which the two Conventions regulate in international law. In particular, there are certain connexions between the Conventions and the species which are of greater importance than might appear from a superficial consideration. It is contended that much understanding can be gained from focusing particularly on the ‘interplay’ between the two Conventions.

The second aim is to explain the place of these connexions in the ongoing debate over which philosophy of use of natural resources the world should adopt. The original contribution to knowledge which it is hoped that this thesis makes is that such connexions are (for the first time) both revealed and explained in the context of the use of natural resources in international law and politics. Understanding how and why these connexions exist will help us better to understand the debate, the politics and the international law in the area. It is hoped therefore that this thesis will give the reader greater understanding of the Conventions and species considered, and also of the wider international debate as to how best to protect and use natural resources. Finally, recommendations for the future will be put forward - explaining in particular how the Convention on Biological Diversity might be used to set parties on a path toward reconciliation; and toward an approach to the management and protection of species that will afford more accommodation for different viewpoints and greater recognition of the value of biodiversity.

This is necessarily a lengthy thesis,² as it is not possible to understand either species or either Convention in isolation - their histories of international governance needed to be carefully investigated. As the researcher is a South African academic, and this thesis is submitted to a South African university, it seemed both useful and almost essential to return regularly to consideration of the South African perspective - this was not difficult, of course, as South Africa is an important stakeholder in the research area..

¹ See (n 2365) for the full quote.

² The Contents Page contains essential linking summary paragraphs to assist the reader to understand the scope/plan of this thesis.

1.2 The argument of the thesis

The structure of the thesis essentially takes the form of an argument that:

- i. Whales and elephants have, through the histories of mankind's interactions with them, reached similar points within international law - despite the species' inherently different statuses either as species free for taking (whales) or as species falling into the dominion of states (elephants).
- ii. The protections afforded to both species are argued not to be adequate, or not to be sufficiently nuanced to be effective, with these arguments being made both by proponents of preservation and proponents of conservation (in the sense of sustainable use).
- iii. An important reason why the management, in international law, of both species is not currently optimal is that the separate treaties (the ICRW and CITES) which govern such management in international law are inadequate. The two treaties are 'elderly'; and their respective operations are riven with conflict.
- iv. There are essentially two reasons why the two treaties are inadequate: that both are representative of a problematic tradition of managing particular wild species on their own, as if these species were somehow isolated from their ecosystems; and that the treaties both suffer from the problem that their states parties currently lack the common vision necessary for the treaties to succeed (the latter division not being intrinsic to the treaties themselves, of course, but the problem is that the treaties are inadequately designed to harmonise such disparate philosophies). This becomes apparent from study of efforts made at meetings, or Conferences of Parties, of both treaties to undermine (or at least circumvent) the other; and of the stark differences in beliefs which are revealed at such meetings.
- v. The conflict between the parties sometimes seems irresolvable, given the deep philosophical differences which appear to exist.
- vi. It might, eventually be possible, however, to reconcile the different, even seemingly mutually exclusive, views of states under the framework of a rather different sort of treaty: an all-encompassing treaty which considers all of the component parts of biological diversity - and it is suggested that the world is indeed moving, albeit slowly, in this direction. In this regard, the CBD might be an appropriate 'umbrella' instrument of governance.
- vii. Whales and elephants have come, through their histories and perhaps because of their natures, to be focal points for the world's states in the battle to determine what mankind's future relationship with all wild species, and all natural resources, should be. The battle over whales and elephants has significant implication for, and may even determine, the shape of this future relationship.

1.3 The thesis in broad outline

The central tenet of this thesis is that whales and elephants are linked, in international law and politics, in ways that are important but which have not to date been adequately recognised and researched. It is not the mere fact that elephants and whales *are* linked which is researched; rather, that some of the numerous links which they have are both surprising and significant.

The contention is made that recognising and understanding the linkage between the two species, and the nature of the two treaties which govern their management and protection in international law, is illuminating for the study of the use of natural resources generally - and also international environmental law generally.

The important argument which is supported by this contention is that the world needs to move away from managing and/or protecting species in isolation; and to move toward understanding, managing and protecting species within their ecosystems, in a holistic fashion. If law is to fulfil its role as a tool to achieve this, then the true nature of international law as an 'ecosystem' must be recognised. Ultimately, this is the 'goal' - the 'usefulness', hopefully - of the research.

On linkage, there is the fairly obvious link that both species are perceived to be endangered.³ Another is that both might play 'keystone' (or even 'super-keystone') roles⁴ within their environments. There are physical links in that both species are generally considered to be 'especially' intelligent and sensitive; with, allied to this, the link that the species are both considered to be 'charismatic'.⁵ There is historical linkage in that both species have experienced near-catastrophic population declines due to overuse by humans;⁶ and that both have come, over time, to be given relatively stringent protection in international law.

There are then less obvious links, such as both species (or at least sub-species thereof) being argued by different states to be either endangered or non-endangered; with concomitant arguments being made that exploitation would be either a positive or a negative thing for the long-term survival of each species. The point here is that the two species share the somewhat peculiar status of being perceived simultaneously as both endangered and non-endangered (even over-populous).

Further, and very specific, linkage can then be found when the two treaties which are used to govern management of whales and elephants in international law are considered. Examination of the histories (at times congruent, and at times divergent) of the two treaties helps the researcher to understand each. These histories do much to elucidate the development of states' understandings of conservation (sustainable use) and preservation. Further understanding of the two treaties is gained from focused study of the ways in which states parties have attempted to use the one against the other in order to undermine their opponents' positions; or to use the one to support their position at the other.

This point provides, in fact, the central point of the thesis - that there is this very specific nexus between the two treaties. Understanding this connexion, and how the two treaties function in relation to each other, can hopefully cast a beam of light into the darkness of the future.

The study of the two treaties can, it is submitted, even shed significant light on the natures of multilateral environmental treaties - so that, hopefully, treaties can in future be crafted with

³ See 12.1.

⁴ *Ibid.*

⁵ See 18.

⁶ See 3.1 and 5.1.

greater sophistication, to prevent the sort of impasse that has become a feature of the International Convention for the Regulation of Whaling (ICRW), particularly, and the Convention on Illegal Trade in Endangered Species (CITES). Given the nature of international law, however - with the sovereignty of states being relatively unimpugnable; and there being no general arbiter⁷ with the authority to determine legality and the power to enforce compliance - it is likely to be some time before such a treaty could be created. In the meantime, probably the best that we can do is seek to understand as fully as we can the inherent 'biodiversity' of international agreements and the ways in which they exist in the 'ecosystem' of international law and politics - in the same way as scientists seek to understand, and are increasingly managing to understand, the interdependent relationships of living things in their ecosystems.

Ultimately, it is to be hoped that a framework treaty - specifically the Convention on Biological Diversity (CBD),⁸ if no new treaty is crafted - might be used to broaden governance of the use of natural resources globally. The advantage of this would be that it would enable the world to move away from its present focus on single-species (and single-issue) treaties; and to move toward more sophisticated governance techniques. It is the opinion of the present writer that the world's focus on governing species singly is one of the biggest problems which we have in protecting biodiversity.⁹

There are numerous physical environmental problems which currently bedevil the world in its efforts to conserve wildlife - such as, in no particular order, habitat destruction, the impacts of pollution and climate change, invasive alien species, the isolation of biodiversity 'islands', and the wildlife trade (both legal and illegal). There are also numerous legal problems - such as, in no particular order, the overemphasis in international law and legal relations on the sanctity of sovereignty, the lack of effective monitoring mechanisms, and the inability of those bodies which have been created to oversee treaty operations to enforce treaty requirements. It is to this latter list that the single-species/single-issue problem belongs, it is suggested.

As we move, in all spheres of environmental governance, toward more integrated and holistic management techniques, so international law needs to follow suit. At a time, in fact, when the world's states seem to be moving toward synergies and clusterings of international instruments,¹⁰ almost to a 'biodiversity of conventions', it sometimes seems that nobody wishes to touch the ICRW, and the whaling issue generally, 'with somebody else's ten-foot barge pole'. It seems, even, that there is at least a degree of careful avoidance of the whaling issue-area in other, newer, multilateral environmental agreements.¹¹ One possible reason for this is that states attach so much importance to whaling that they can only get agreement elsewhere by excluding the issue-area. Another possible reason is that states are so worried

⁷ Where none has been created for a specific treaty.

⁸ See 15.2 and 20.

⁹ See 2.4 and 20.

¹⁰ See, for instance, K Stendahl 'Enhancing Cooperation and Coordination among the Basel, Rotterdam and Stockholm Conventions' in T Kolari & E Couzens (eds) *International Environmental Law-making and Diplomacy Review 2007* (2008) 127; available at www.joensuu.fi/unep/envlaw.

¹¹ See D.2, D.5 and D.6.

by the possibility of contaminating newer treaties with the conflict that has marked the ICRW for decades that they exclude the issue-area.

CITES improves on the ICRW, but remains by its very nature (*vide* its approach of providing species with differing levels of protection, by listing species in Appendices) a treaty which categorises species. CITES singles species out for protection and thus contributes to the problem that protection is not accorded to the ecosystems in which these species live; or to other species which live interrelated with the species protected.

One of the biggest problems which CITES faces is the difficulty of distinguishing between endangered and non-endangered species in international trade. To expect a busy. Untrained customs official to be able to identify an endangered black-footed bog-trotter, when the person transporting the species claims that it is a non-endangered brown-footed bog-trotter is unrealistic. Adding to this is the problem of 'look alike' species - and variations within species. Birds, for instance, may have male, female, juvenile, intermediate, regional and melanistic differences.

Another problem lies in the trade of non-endangered species where the removal of individuals of these species might have unforeseen, perhaps even unforeseeable, impacts on endangered species which share their ecosystems - and on the general health of such ecosystems.

What is needed, therefore, is an approach which focuses on protecting habitats, ecosystems, and wildlife generally; rather than the current approach which requires specialised identification.

1.4 Research methodology

This thesis has deliberately not been written from any one particular standpoint, or from any one 'tradition' within research methodology. To do so would necessarily have hampered the effort the researcher made to remain dispassionate throughout - and to seek to understand, and to convey as clearly as possible, the different views of major protagonists in the debates. The thesis is written from a very historical perspective, seeking to work out exactly what happened in respect of at least the most important events - and to explain these with reference to other historical actions and happenings. Importantly, effort is made also to ascertain what precisely are current positions held by important political and legal actors; and what might be the future implications of these positions.

This thesis involved consideration of a wide range of source material - both original and secondary. Much use was made of published material; with books, chapters in books, journal articles, official documents and the original texts of conventions being consulted as relatively reliable secondary source material. Where possible, in books and chapters in books especially, the effort was made to compare and contrast different versions of historical events - particularly where these versions were given by persons who had been involved in such events.¹² Discerning use was then made of other secondary material; with media-based reports being used largely to keep abreast of events, rather than to obtain reliable commentary.

¹² See, for instance, 5.1.

Over the years of the study, the present researcher became well-acquainted with the available literature - to the extent that there cannot be many directly relevant works available which were not consulted. In all of this, one thing which the researcher signally failed to discover was any other work dealing with the specific linkage of whales and elephants, with reference to the ICRW and CITES; apart from a few cursory mentions within texts, which mentions have been discussed in the present thesis.¹³

Use was made throughout of internet-based sources. Obviously, the internet is not the most reliable research tool - however, each source consulted is properly referenced and the context of each such use should make it clear that, in every case, the trustworthiness of the source is assessed on its own merits. In most cases, internet-based sources have been accorded credibility where the source is a credible journal or book - or where the author/originator is named, especially where that person already has an international reputation in the relevant field or was involved in historical events. Beyond this, the internet was used largely as a source of updates - in order to follow factual events as they unfolded during the course of research. Where possible, the date of accessing of particular internet sources has been given.

Over time, and once a considerable body of secondary source literature had been canvassed, and research issues became more focused, original source material became more relevant. A research visit to the Secretariat of the International Whaling Commission (Impington/Histon, Cambridge, UK) enabled the present researcher to make photostated copies of many original texts - documents which are not available in any other form or place. Particularly from the early 1970s onward, after the creation of the United Nations Environment Programme (UNEP) in 1972, and the creation of CITES in 1973, this researcher sought out documentation dealing with all of the major topics in the thesis. In particular, the original verbatim transcripts of plenary session debates, the summary reports by IWC Chairs, and the Opening Statements put forward by Contracting Governments and other parties were recorded. Following this, on return to South Africa, this researcher spent time reading each page recorded.

Unfortunately, time and financial constraints prevented a similar trip being undertaken to consider documents at the CITES Secretariat in Geneva, Switzerland - this remains a project proposed for the future.

Another form of original research was undertaken through the conducting of personal interviews with persons identified as relevant roleplayers. The interview research was quite structured, in that a set of standard questions was drafted by the researcher and used for each (of most) of the interviewees. This gave the researcher the opportunity to compare specific comments and assertions by persons on different sides of the debates.

¹³ See 5.3.6. Writers such as Darby, Friedheim, Payne, Pickover and Vogler have mentioned the possibility of deliberate linkages between elephants and whales being made in order to achieve certain objects. However, none of these writers have explored the issue in any depth. Gillespie has considered 'forum shopping' between CITES and the IWC but not the particular links between whales and elephants. It seems strange to the present writer that the subject has been so apparently underexplored - although arguably trite that the species are linked, it appears to me that some of the links are so important (and sometimes so unexpected) that it is a subject obviously worthy of research.

While each interview followed the same essential structure, scope was always given to each interviewee to raise and discuss issues beyond the confines of the standard questions. In each case, too, much focus was placed on those issues of which the interviewee has special experience or knowledge. In this sense, the interview research technique adopted was unlike the common 'standardised interview' technique where the questions asked are required to be identical - and the point is to draw comparative results from data. This technique would have been inappropriate for the sort of interview-based research in which I engaged - where I sought out important role-players or persons with significant experience, and tried to tap into their memories for particular information.

The reliability of the information gained from interviews stemmed, in most cases, from the credentials and status of the interviewee - all of the persons interviewed are listed (in the Bibliography attached to this thesis) and their capacities given, together with the dates the interviews were conducted. As such, these represent the opinions or recollections of people who may be considered authorities. No ethical problems arose, in my view, from the use of the interview data collected; as interviewees gave their consent for their views to be recorded and quoted. Where an interviewee indicated that a comment made, an opinion given, or a fact recollected was 'off the record' this request was observed and the data was not used in the thesis. Interviewees were offered the opportunity to have final approval over their words before this thesis was submitted for examination, and some did take up the offer - in most cases where an interviewee wished to make a change, this took the form merely of rewriting for clarity.

On occasion, where an interviewee read relevant extracts of the draft thesis and expressed different views to those of the present researcher, this was recorded - for the sake of argument - in footnotes.¹⁴

Ultimately, the present researcher chose to reprint most of the extracts which I used from interviews almost verbatim (almost all interviews being recorded on tape, handwritten notes being made of the others) in the text of the thesis - this was because, carefully placed in context, this gives the thesis (at least, this being the researcher's hope) some additional value as a permanent record of views which might otherwise have gone unrecorded.

The persons interviewed were fairly carefully chosen as being representative of different, and important, viewpoints. Unfortunately, some persons did not respond to requests for desired interviews - for instance, officials in the Tanzanian Wildlife Service. Interviews with several relevant people in Iceland were agreed to, but unfortunately too late for travel plans to be changed. Time and financial constraints meant that the researcher was unable to travel to Japan, as valuable as such a trip might have been; this, too, remains an objective of future research.

The real value, in many cases, of conducting interviews proved to be that these gave the researcher much by way of background and context that simply could not have been derived from books and journal articles. To give an example of this, an interview was conducted with

¹⁴ See, for instance, (n 1343), (n 1347) and (n 1386).

Nan Rice in Cape Town, South Africa.¹⁵ Nan has for many years studied dolphins and whales and been active in efforts to protect them - she is Director of an NGO, the Dolphin Action and Protection Group,¹⁶ which gives valuable support to rescue stranded cetaceans and engages in cetacean research. In general discussion, Nan told me that in the late 1970s, in the early days of her work with cetaceans, she had lived next door to a man named Andrew Behr, whose two daughters (Susan and Theresa) had played with Nan's own children. She did not find out until much later that Behr was the owner of the world's most notorious pirate whaling operation in the late 1970s - with two notorious whaling vessels, the *Susan* and the *Theresa*.¹⁷ While anecdotal, and of course not directly relevant to this thesis, such background details (in their myriad) have (hopefully) enabled the researcher to build up a good general understanding of the complicated network of linkages and personalities involved in the various debates.

The conducting of original interviews, and contact with persons involved in the debates, led ultimately to another form of original research: attending the 59th Annual Meeting of the International Whaling Commission as a member of the South African delegation. It is difficult properly to convey the benefit of this to my understanding of the area - even this limited experience of negotiation truly gave me insight that I could not otherwise have gained into how an international treaty operates in practice.

On referencing, the approach has been taken of listing in the attached Bibliography, as far as possible, every single source which was consulted during the writing of the thesis.

1.5 Conclusion to the introduction

In the course of research, this (usually vegetarian) researcher has eaten elephant (biltong), minke whale (delicious in wine sauce) and harbour porpoise (roast, and too strong a taste for me); drunk beer at midnight while bobbing in a rubber duck on the open sea off one of the world's largest storm petrel colonies at roost after setting nets for seals (in order to fit them with radio collars); been charged by elephants (to the point that this thesis might never have been completed) and helped to remove the tusks of an elephant that had probably been poached; fed embarrassingly too many fish while watching whales; changed a word in a Resolution of the International Whaling Commission, and had a quote of mine repeated on the floor in plenary session; and tried through it all to remain as objective as possible. For the last decade, my immersion in this research has sometimes felt almost total.

In the end, in the final writing up of this thesis, several hundred pages needed to be discarded to bring it down to readable length, and much had to be shed. A lengthy chapter on the culling, and the national management, of elephants in Southern African countries generally (and South Africa specifically) was particularly painful to 'cull'. Also culled were much of the history of whaling and the ivory trade; the history of domestic conservation in Southern Africa; the history, and the contemporary significance, of aboriginal subsistence whaling; and explanations of other threats, such as pollution, to cetacean species. My hope is that what

¹⁵ *Personal communication* Interview with Nan Rice, Cape Town, 7 November 2006; E Couzens.

¹⁶ See <http://www.dapg.org.za/>.

¹⁷ For confirmation of Behr's involvement and the names of the ships and the daughters, see D Day *The Whale War* (2nd ed, 1992) at 77-80.

remains in an admittedly lengthy thesis will be considered as having relevance - where an aspect (such as the consideration of the North Atlantic Marine Mammal Commission¹⁸) might not seem immediately relevant, it is my hope that the summary paragraphs in the Contents pages will aid with this.

In the final analysis, my research methodology has been to seek the truth of *what* has happened, in historical context; the truth of *why* it happened, in the light of as much critical dispassion as could be mustered; and to present honestly, with the setting up of no straw men, the different viewpoints of relevant and important actors. I did not seek to interpret events in the light of any particular ‘research paradigm’ or from any ‘research tradition’; but merely to record events reliably and then to draw conclusions which are at least reasonable, if they are not necessary implications. Even where I have discussed shifting discourse in the ‘preservation versus conservation’ debate, or in the transformation of understandings of the ‘ecosystem approach’ over time, I have sought the *via media*.

Given the constraints under which the present thesis was written, and the approach taken of elucidating contemporary attitudes as they have been informed by history, with no ‘bias’ in such elucidation other than a deep cynicism toward politics and the law-making process in general, it was not possible to write from a ‘biased’ viewpoint. Further research might, however, eventually free me to take one particular view, or another; and even perhaps to engage in consideration of events from particular, and far narrower, research perspectives. Paradoxically, near-complete immersion in my research demanded near-complete neutrality in my research methodology.

¹⁸ See 8.3.

2 Multilateral environmental treaties

2.1 Environmental treaties in the modern world

The United Nations Charter contains no direct environmental provisions. However, it is under the aegis of the United Nations that the majority of the world's international environmental treaties exist and from the United Nations that they derive their authority.¹⁹ Yet there is no body which can force a state to act in a particular way; or even to adhere to the obligations it may have agreed to in a treaty.

One of the first questions asked about international law - and a surprisingly tricky question on which to give a definitive answer - is whether international law really *is* law. Certainly it is not law in the sense in which most citizens come to understand law during their process of becoming politically aware. It is difficult to imagine a state where all citizens are equal not merely to each other, but to the state and its institutions also, and where there is no acknowledged legislature, executive or judiciary; and yet, this *is* the international legal system.²⁰ Shaw suggests that '[i]t is the legal quality of international law that is the first question to be posed. Each side to an international dispute will doubtless claim legal justification for its actions and within the international system there is no independent institution able to determine the issue and give a final decision'.²¹

It is important to understand the process by which Conventions, or Treaties, or Multilateral Environmental Agreements, come into existence. Awareness of an environmental problem with a cross-border nature might begin at as low a level as the 'local' - within a group, or village, or community, or municipality. Awareness might then reach the government of the country in which the process begins. Eventually, awareness might reach the international community of states, governments, itself. More cynically, the pressure from and warnings by individuals and groups might be borne out by an environmental disaster.

At some point, the idea of holding an international convention might be mooted. The aspiration will be to bring together a large number of states, including relevant and powerful actor states, and to see a binding treaty result - to see the creation of binding international law, with meaningful commitments toward solving the perceived problem. Almost from the same moment, however, the 'watering down' process will begin - the hard reality of international law and politics being that states rarely commit themselves to treaties unless the commitments they make are largely ineffectual, or their bargaining strength is weak and they have acted against their own interests for the sake of gaining a different advantage. Altruism is rare in international law.

¹⁹ Arguably, the International Convention for the Regulation of Whaling [ICRW] is an exception to this - having been adopted in 1946, at roughly the same time as the United Nations Charter. Today the ICRW is a Convention which is often treated as being unique - probably because it is so riven with conflict. While other treaties move toward 'clustering' with related treaties, the ICRW remains apart - governing species that arguably ought to be managed by, or through, a cluster of related treaties.

²⁰ This point was made by Professor Michael Cowling, Dean of the Faculty of Law, University of KwaZulu-Natal, in a lecture given in June 2006 on the 3rd University of Joensuu/UNEP Course, hosted by the Faculty of Law, University of KwaZulu-Natal, Pietermaritzburg. See also P Sands below at (n 47).

²¹ M N Shaw *International Law* (5th ed, 2003) at 2.

The ‘watering down’ aspect will almost inevitably see the result of a successful convention being not binding ‘hard’ law; but rather guidelines, intentions, statements of intent and aspirations - so-called ‘soft’ law. The best, probably, that the international environmental lawyer can hope for is that over time, as these guidelines are repeated in successive conventions and international legal instruments, they might come to harden into binding international customary law.

Birnie and Boyle comment that it will sometimes be impossible, and it might even be undesirable, to have detailed and precise rules of international environmental law - this because ‘a certain flexibility is often the price which has to be paid to secure international agreement’.²² The ‘undesirable’ aspect comes in, they suggest, because ‘a treaty which casts precise rules in stone may be hard to renegotiate and thus too inflexible to respond to changing conditions’;²³ and this might particularly be the case with regard to environmental problems, which ‘tend to require flexible solutions to allow for changing scientific evidence, new control technologies, new political priorities, and the differing circumstances of various states’.²⁴

The International Convention on the Regulation of Whaling [ICRW] was agreed to in 1946, and came into force in 1949, but can arguably be said not to be ‘under’ the United Nations as its origins lay not in the changing world order after the Second World War; but - almost in opposition to this changing order - in the small club of nations which were actively involved in commercial whaling. Even before the War, there had been several earlier treaties on whaling which prefigured the ICRW.²⁵ In some ways, the ICRW does not share the characteristics of international environmental treaties negotiated later under United Nations auspices. In fact, some analysts might even argue that it is not an environmental treaty at all - but a trade treaty which is being used, or misused, as an environmental instrument. This would be to go too far. Although its *raison d’être* certainly lay in trade, or perhaps in control of trade, the means chosen to control or regulate trade took the form of environmental regulation.

Modern international environmental treaties are changing shape. Unlike older treaties, modern treaties more regularly include provisions for aid (financial, or in some other form) to be provided to states party - especially developing countries - when they are asked to act in ways that benefit the developed world or other states, at cost to themselves.²⁶ There is also a trend for modern treaties to include monitoring and reporting procedures, with support structures and institutional frameworks.²⁷ Modern treaties - at least the most recent - appear further to be taking more holistic approaches than in the past. The effectiveness, or lack thereof, of older treaties is worth examining in the light of changing treaty terms and practices.

²² P Birnie & A Boyle *International Law and the Environment* (2nd ed, 2002) at 8.

²³ *Ibid* at 9.

²⁴ *Ibid* at 8-9.

²⁵ See 3.1.1 generally.

²⁶ See, for example, D Kaniaru ‘International Environmental Negotiation Blocs’ in E Couzens & T Kolari (eds)

International Environmental Law-making and Diplomacy Review 2006 (2007) 3; available at www.joensuu.fi/unep/envlaw.

²⁷ See, for example, T Kuokkanen ‘Designing Compliance Mechanisms under Multilateral Environmental Agreements’ in E Couzens & T Kolari (eds) *International Environmental Law-making and Diplomacy Review 2006* (2007) 27; available at www.joensuu.fi/unep/envlaw.

There are important lessons to be drawn from loopholes which become apparent in older treaties - and in the ways in which states exploit weaknesses. If the goal of international environmental law is, as it surely must be, protection of the environment and corresponding protection of human interests, then effective treaties are required - and weaknesses need to be identified and eliminated, a process that will almost inevitably require the accommodation of disparate, and often contradictory, interests.

In considering the nature of multilateral environmental agreements (MEAs); it becomes apparent that it is extraordinarily difficult to create and then maintain functional treaties able to 'stand the test of time'. The ICRW is an 'elderly' MEA and is arguably showing itself to be unable to cope with at least some of the ways in which international views on management of natural resources have changed. MEAs that are not originally designed with sufficient flexibility are ill-suited to having the views of their Parties change - sometimes even to the extent that their Parties hold positions the opposite of those with which they began. This would not be a problem if all Parties were to change their minds in similar directions, but where some Parties insist that the MEA continue to function as originally intended, and others to insist that it has changed or must change, conflict arises. In the case of the ICRW, the conflict has become so great that it is almost impossible to conceive of replacing the MEA - it would be too difficult to get agreement on a future treaty.

One point of this thesis is to investigate a particular aspect of the ICRW - its linkage with another specific treaty - and to investigate the links between the species governed by the IWC and the highest profile species governed by that other treaty. Japan and Norway, in particular, appear to have attempted to use the Convention on International Trade in Endangered Species (CITES) in order to circumvent²⁸ the moratorium on whaling imposed by the International Whaling Commission (IWC) - the management body created by the ICRW. Allied to this is the potential for Japan and Norway, especially, to use the international trade in ivory as a symbol and precedent for efforts to resume whaling; and for opponents of commercial whaling to use the ivory trade to support the preservationist idea in the conservation of whales.

These, of course, are only two ideas. There are linkages generally between the two treaties - both being (at least relatively) elderly, and yet high profile, treaties. The linkages are not only inherent, but have been made specifically by different parties - and by the treaty administrators, and parties, themselves. The ICRW deals only with one species, CITES with many - but on occasion it has seemed, so bitter have the arguments been, as though CITES is dealing only, or mainly, with elephants (there are even tusks in the CITES logo!).

The point must also be made, of course, that the anti-whaling states have used CITES also - in order to support their position at the IWC. As should become clear later, however, this tactic appears largely to have been used in response to efforts by the pro-whaling states to resume commercial whaling. It is therefore the efforts made by Japan and Norway to link the

²⁸ According to Nicky Grandy, Secretary to the International Whaling Commission, 'circumvent' is not the right word to use - her response being that CITES deals only with trade and that it can not be used to circumvent the IWC, only to 'weaken' it. *Personal communication* Interview with Nicky Grandy, Cambridge, 1 February 2007; E Couzens. I have continued to use the word 'circumvent' as this would be the effect, were proposals at CITES to downlist whales be successful. Of course, that would then provoke a clash between CITES and the IWC.

IWC and CITES which this thesis will focus on - although returning periodically to consideration of the use of CITES by the anti-whaling states.

It is the present writer's contention that neither the whaling debate/issue nor the ivory trading debate/issue can be fully understood in isolation from each other. Nor, in fact, can any area of global environmental trade be fully understood without an understanding of both the whaling and ivory areas. This is because the two species are the 'global icons' of the world's battle to define the meaning of 'conservation' - and to decide on the value which will be ascribed to biological diversity ('biodiversity'), and how this can best be protected. Neither the important political actors loosely described as adhering to a 'protectionist' philosophy, nor those of equal importance adhering to a 'sustainable use' approach, will ever be found claiming to be destroying, or wishing to destroy, biodiversity. Both sides claim that biodiversity must be protected and that their approach is the correct one for achieving this goal. They cannot both be right.

The argument being made is that this battleground is to be found, in its purest form, in the debates over the resumption of commercial whaling and the resumption of the ivory trade. However, to the writer's knowledge, the specific linkage of the two has not to date been adequately explored. In a 1994 collection of articles entitled *Elephants and Whales: Resources for Whom?*,²⁹ for example, not one of the 17 articles explores specific linkages between the two species in international law - each deals either with one species or the other. For the writer, this (Doctoral) thesis did not stem from a deliberate effort to choose a topic - rather, the topic 'found' the writer. In the middle of 1997, the writer was in Harare and became peripherally involved with the CITES Conference of Parties. That year, the Conference was dominated by the efforts of Southern African states (ultimately partially successful) to have the African elephant downlisted from Appendix I to Appendix II, thereby allowing limited trade in ivory to resume. Two items which did not garner great media attention struck the writer while listening to various debates and reading news reports. The first was that the two developed countries which argued most fervently in support of the Southern African right to 'sustainable use of their sovereign natural resources' were Norway and Japan. The second was that a proposal by Norway, to downlist a subpopulation of minke whales from Appendix I to Appendix II, received a majority of 'yes' votes in a secret ballot - and the number of countries which voted 'yes' was greater than the entire membership of the IWC at the time.³⁰ From these two seeds this thesis grew.

In studying the linkages between the species in international law, it is important to understand the two treaties under which the trade in each species is regulated. To be learned from this is that international environmental treaties may have shelf-lives. CITES and the ICRW might well be nearing the ends of their 'shelf-lives'. Neither is necessarily being used for their intended purpose: the ICRW, with its legacy as a trade and price-maintenance treaty, not being effective as a preservation treaty; and CITES, likewise, drifting perhaps too far from its trade co-function in some respects, while stimulating trade overly in others.

²⁹ M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994).

³⁰ See 5.3.6 and 6.1.4.

The question is: what happens to international environmental treaties/multilateral environmental agreements, when they have been running for decades and the world in which their original terms were formulated has changed; the attitudes of their parties, or some of them, and of the world's states generally have changed; and they end up being used for purposes for which they were not originally intended? This is problematic for a number of reasons, including that the treaties themselves may not be suited for the purposes to which they are being applied; but they are vulnerable to the charge that they are even acting *ultra vires* if they have deviated from their original purposes.

This leads necessarily to discussion of a related issue raised: that of differing perceptions of conservation, preservation and usage of natural resources held by different international actors. The principal countries involved in the issues discussed in this paper hold markedly different ideas about conservation, the utilisation of natural resources and indeed the very concept of sustainable development.

The problem then is that when different parties, states, hold radically different perceptions and/or understandings of key concepts, and treaties become deadlocked between these different interpretations, there seems no way forward. It is inconceivable that a deadlocked treaty can simply be replaced by a freshly negotiated treaty which will accommodate all interests - parties become so locked into their opposed positions that the negotiation of a new treaty is not possible. Parties therefore become locked not only into their understandings, but locked into the treaty itself - for a myriad reasons, legal, political and economic - and become as reluctant to break away completely from the treaty as to abandon their positions within the treaty. We therefore limp on with what we have. This is the international law problem that needs to be overcome.

The ICRW is an MEA that often seems to stand on its own - other, more recent, MEAs tend not to be 'single issue' treaties. The question then arises whether the ICRW ought to be, if it can be, brought under the 'umbrella' of a wider conservation regime. This would be difficult as, instead of seeking consensus, Parties to the ICRW have tried to undermine their opponents by playing CITES off against the ICRW - or by using CITES to support their positions at the ICRW.

One might ask why the ICRW is not simply scrapped, or left to become dysfunctional, but it will be the argument of this thesis that the real importance of the ICRW lies in the reluctance of states either to leave it, or to reform it. Its importance lies in its status as a battlefield. What, then, is being fought for? It is the contention of this thesis that the prize is nothing less than the determination of the philosophy of human use of natural resources which will eventually be adopted by the majority of states. To understand the competing philosophies, both 'preservation' and 'conservation' must be explained. Further, the statuses of both whale and elephant conservation in international law will be explained, so that the complete picture is understood.

Former Secretary-General of CITES, Eugene Lapointe asks '[w]hy is the concept of conservation so complex, so difficult to understand?'. He then argues that '[i]t is because understanding nature involves dealing with issues of life and death, and our highly evolved societies have problems accepting this fact' and that '[c]onservation of our terrestrial or

marine wildlife resources [is] interpreted in different ways by different societies and cultures. For some, it means not to use at all: this concept is called Protectionism. For others, it means full-scale use'.³¹

Thomson writes, of the historical development of the clash between the two concepts, that '[a]bout seventy-five years ago, Theodore Roosevelt, the United States' twenty-sixth president, applied the term *conservation* to [Aldo] Leopold's³² developing game management thesis. Roosevelt conceived *conservation* to mean "wise use" of "renewable natural resources", whereupon the term *preservation* began to assume its more correct interpretation inferring "protection from harm". Until that time *preservation* was a rather vague term covering the gamut of wildlife management ideals'.³³ 'There are two arms', continues Thomson, 'of wildlife management - *conservation* and *preservation*. Each concept is distinct and true with its own function and purpose. *Conservation* implies that a renewable natural resource *can* be "used" by man, although such usage is not imperative; it also implies "wise use" ...'.³⁴ '*Preservation*, on the other hand,' he argues, 'implies "protection from harm" (in the short term or the long terms), which makes preservation the antithesis of conservation'.³⁵

Thomson continues, suggesting that 'the two sister concepts are only readily distinct at the extremes of their respective ranges. Conservation and preservation are therefore part of a philosophical continuum, and it could be argued that the manner in which the two concepts have so far been described has merely been a game of semantics'. He suggests, however, that it is important to draw a conceptual distinction between the two; as each contains specific ideas for wildlife management, which ideas might become ineffective if blurred.³⁶

According to M'Gonigle, however, it is vital that eventually the two *are* blurred, or at least brought together. He writes that '... the economic and the ecological ... approaches to human activity seem to present an irreconcilable conflict; we are caught between two competing paradigms. The nature of the conflict must be recognized and a resolution sought. Only then might a lasting stability for man in his environment be achieved'.³⁷

One of the reasons that this is such a difficult problem to resolve has to be because of the way the debate is framed: neither side's argument is in itself impeachable. In this sense, it is akin to the abortion debate, where protagonists are divided into the 'pro-life' and 'pro-choice' groups. The labels are well chosen as it is hard to object to either - both are worthy goals. In

³¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 1. 'Preservation', says Lapointe, 'has become an ironclad dogma, a litmus test of politically correct environmental credentials. No longer just an abstract idea bantered in obscure lecture halls by disheveled academics, it is now a powerful political movement whose breadth and scope rival the growth of Christianity or Islam'. *Ibid* at 47.

³² Aldo Leopold, 1887-1948.

³³ R Thomson *On Wildlife "Conservation"* (1986) at xxv-xxvi.

³⁴ *Ibid* at 25-26.

³⁵ *Ibid* at 25-26.

³⁶ *Ibid* at 39. 'Although', Thomson argues, 'the degree of overlap in the application of conservation and preservation management practices is very wide, it is nevertheless imperative to divide and distinguish between them *at a conceptual level*. If this is *not* done the important and specific purpose of the one idea will become lost in that of the other. Once this happens, it becomes impossible to logically rationalize the crucial elements and processes comprising wildlife management'. *Ibid* at 39.

³⁷ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 120.

the same sense, at a philosophical level, neither being ‘pro-sustainable use’ nor ‘preservationist’ can be impeached. The ‘devil lies in the detail’ and it is here that critics of either approach must base their attacks on the consequences/implications of their targets.

The word ‘conservation’ is, of course, a tricky one, as it is used by both ‘preservationists’ and ‘sustainable users’. Willem Wijnstekers, the current Secretary General of CITES, for instance, suggested in his opening address to the 14th COP of CITES, in July 2007, that CITES is an adaptable treaty which ‘has learned to balance conservation and sustainable use’.³⁸ By and large, for purposes of this thesis conservation will be taken to mean ‘sustainable use’ unless it is specifically or by context indicated that this is not the meaning intended.³⁹

It is contended in this thesis that the battlefield is not merely the ICRW, but CITES too - and that potentially decisive battles are being fought with both whales and elephants, the two most iconic species the world knows, as subjects. More specifically, that neither of the two species, or either of the MEAs under which they are managed internationally, can be understood separately from each other in international law. That there are links - and some extremely specific interactions - in international law and politics between the two species and the two treaties is the basic problem which this thesis sets out to prove; and which, to the best of the present writer’s knowledge, no other researcher has ever tried to do. In particular, given the context of the writer and the importance of the country, attention is given throughout the thesis to the position of South Africa.

2.2 Environmental treaties generally

The traditional sources of international environmental law are treaties (although technically only contractual in nature), *ius cogens*, custom, the writings of jurists⁴⁰ and - the cynical commentator might suggest adding - the environmental disaster (it being quite staggering sometimes how quickly states will move to create international law in the aftermath of a disaster).⁴¹

Lyster has written that ‘... “[h]ard” law refers to firm and binding rules of law. The content of treaties ... [whereas] “[s]oft law” ... consists primarily of recommendations or declarations ... and has been described by one international legal commentator [Kiss]⁴² as “rules which have to be considered as law insofar as they fix norms with which States should comply, but which

³⁸ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES’ *Earth Negotiations Bulletin* 21:51 (4 June 2007).

³⁹ This usage can, of course be tricky; as seen, for example in 2003, when a majority - largely made up of ‘preservationist’ states - in the IWC voted to form a ‘Conservation Committee’. The wording of the Resolution which created this Committee included a notation that the IWC ‘has evolved into an organisation internationally recognised, amongst other things, for its meaningful contributions to the conservation of great whales’ and that ‘the Commission has gradually developed an extensive conservation-oriented agenda’. See T Wansbrough ‘On the Issue of Scientific Whaling: Does the Majority Rule?’ (2004) 13:3 *RECIEL* 333 at 334.

⁴⁰ According to Article 38(1) of the Statute of the International Court of Justice.

⁴¹ See, for instance, the cluster of marine pollution conventions that were agreed to in 1969 and 1970, after the *Torrey Canyon* disaster in 1967; or the nuclear energy response treaties negotiated after the Chernobyl disaster in 1986; or the 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, after exposure in 1982 of the extent of the hole in the ozone layer above Antarctica.

⁴² S Lyster *International Wildlife* (1985) at 10-11, fn 16: ‘A C Kiss, 1976’.

cannot be enforced in the traditional meaning of the term” ...’. Lyster then argues that, in the context of wildlife law, recommendations are more usually made than are binding commitments; and that this makes soft law ‘particularly relevant’.⁴³

It appears, though, that Kiss’s definition above is optimistic. Defining ‘soft law’ as ‘rules which have to be considered law insofar as they fix norms with which States should comply, but which cannot be enforced in the traditional meaning of the term’ is perilously close to saying that soft law means laws which do not have to be obeyed. Is it not instead that states weasel out of obligations that they do not like, not that the nature of that thing changes? Within Kiss’s definition, it is further difficult to see how the content of treaties can appropriately be described as ‘hard’ law, when the content of many multilateral environmental treaties consists primarily of guidelines - firm commitments are either few and far between, or the content of the commitments is without significance.

All international agreements, it has been suggested, inevitably result from ‘a compromise of a variety of national interests to achieve the greater national benefit, as perceived by the states sacrificing these interests, accruing from international agreements restricting the interests of others as well as themselves’. Further, political compromises must be negotiated if international agreement is to be reached in whatever forum debate takes place.⁴⁴

In the particular case of the International Whaling Commission, however, Birnie suggests that ‘[t]he United Nations and its specialised agencies were, ... given no role in the foundation or in the subsequent development of the [IWC]’; and that the history of the IWC might well have been very different had this not been the case.⁴⁵ This is a useful argument. The IWC is a body that has stayed out of the mainstream of multilateral environmental agreements, with its concentration on a single set of species, and this isolation may well have contributed to its arguably dysfunctional nature.

The counter argument to the charge that states do purely as they please, is that generally states do tend to obey the commitments which they make. As Lyster puts it, ‘[i]nternational law inevitably presents serious enforcement problems, simply because there is no international police force and the International Court of Justice is far weaker than any national judicial system’. He is nonetheless optimistic, going on to write that treaties are often better enforced than is realised; partly because of improved administrative measures, but also because states, by and large, do have interests in preserving order and preventing chaos. He feels even that this is particularly true for wildlife treaties, where general system collapse would harm all participants.⁴⁶

It might be that this attitude on the part of states leads to their acting, on occasion, to their own detriment in favour of the common good of keeping the international legal system stable.

⁴³ *Ibid* at 10-11. Lyster tells us that ‘[s]oft law is particularly relevant in the context of international wildlife law because it is common for a wildlife treaty to require its Parties to hold regular meetings at which recommendations to improve implementation of the treaty are made. Recommendations made in these circumstances are classic “soft law”...’. *Ibid* at 10-11.

⁴⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 203-204.

⁴⁵ *Ibid* at 203-204.

⁴⁶ S Lyster *International Wildlife Law* (1985) at 14.

However, it does not prevent conflict and would tend to fix in place, rather than to mend, problems - in other words, to maintain the *status quo* even where this is not ideal and causes hardship and dissatisfaction. It might lead also to states seeking private ways to circumvent and even to undermine treaties deliberately.

According to Sands, the process of negotiation of an international agreement is 'not generally understood' as it 'does not resemble law-making in national bodies'. The first principle of international law, he suggests, 'is that all states are sovereign and, theoretically at least, equal. This means that each participates in international negotiations on an equal basis'. The reality, of course, as Sands explains, is 'very different, ... and in sum, the processes of making international treaties bear[s] very little relation to what is described in textbooks'.⁴⁷

Sands brings an interesting perspective to the negotiation of treaties when he suggests that '[t]he Anglo-American tradition aims for obligations which are clear and precise. We like to tie down our rules very firmly so that they cannot be "interpreted" into more onerous obligations, or at least into obligations which are radically different from those which the drafters intended'.⁴⁸ As will become apparent, in the context of the ICRW particularly, and perhaps even of CITES, this comment is ironic in the extreme - as it is the Western (and Anglo-American) countries, largely, which have sought ambiguity and more onerous obligations in terms which parties outside of this tradition argue are clear. According to Sands, the negotiation of international instruments is about 'painstaking attention to detail, compromise, and the search for consensus'. 'And', he adds, 'it is about trust, amongst delegations and individuals'.⁴⁹

Amerasinghe suggests that generally the law according to which a particular organization operates will flow 'basically from conventional law, namely the constitution of that organization'. The practice of organizations will then be based on 'legal opinions of the legal advisers of the organizations and decisions taken by their organs will especially fill out or even expand constitutional texts', with customary international law and general principles of law being relevant when texts are required to be interpreted.⁵⁰

'The starting point' for interpretation of treaties, the same writer argues, is the Vienna Convention on the Law of Treaties of 1969 which provides (in Article 31) that a treaty must be 'interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. Per Article 32, supplementary means of interpretation may be used also - 'including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.⁵¹ Amerasinghe adds that the Vienna Convention

⁴⁷ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 80-81.

⁴⁸ 'This concern,' suggests Sands, 'seems to spring from a fear - within the common law, Anglo-Saxon legal community - of activist judges who might be prone to take a general principle [] and turn it into a more specific obligation ...'. *Ibid* at 83.

⁴⁹ *Ibid* at 84.

⁵⁰ C F Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, 2005) at 20-21.

⁵¹ *Ibid* at 39-41.

gives subsequent practice ‘a substantive place in the ascertainment of the ordinary and natural meaning: subsequent practice may be taken into account in establishing such meaning’.⁵²

The importance of this for consideration of, particularly, the ICRW is that both those Parties which argue that the treaty is not currently being interpreted as it ought to be, per its original text, and those which argue that it is possible for the purpose of the treaty to have changed, have cases that may not, *per se*, be dismissed out of hand.

The changing nature of international environmental treaties has been recognised by various commentators - as has the changing nature of their subject matter. Glavovic, for instance, writes that ‘[i]n the same way that the emphasis in national wildlife law in the United States and in South Africa has shifted from species to habitat protection, from protection of economic values to protection of sport and inherent values, so have the focus and orientation of international treaties similarly evolved’.⁵³

2.3 The historical bases of the two Conventions: The *Bering Sea Fur Seals Arbitration*⁵⁴

According to Birnie and Boyle, ‘[m]odern fisheries problems originate in concepts and doctrines of the law of the sea attuned to the outdated interests of earlier centuries’.⁵⁵ An account, therefore, of the seminal *Bering Sea Fur Seals Arbitration* is essential for understanding the ‘open access’ nature of the high seas - and therefore for understanding the whaling debate.

2.3.1 The dispute

It has been written, by Sands, that ‘[t]he modern rules of international environmental law have a short but rich pedigree’; and that they can arguably be traced back ‘to the late nineteenth century, and an obscure spat between the United States and Britain’ with the ‘world’s first reported environmental dispute concern[ing] the little-known fur seals’.⁵⁶ At that time (the 1880s) international law, according to Sands again, ‘allowed countries sovereignty over their land territory and a narrow band of water up to a maximum of three miles off their coasts’; with sovereignty meaning total control.⁵⁷ Beyond the three-mile limit, utilisation of living resources was free to all.

In the late 1800s, fur seals were declining seriously and rapidly in the Bering Sea - being hunted by a number of countries: Britain (Canada), Japan, Russia, and the United States. The US argued that it had a right to protect, and of property in, the fur seals which lived parts of

⁵² *Ibid* at 49.

⁵³ P D Glavovic *Wilderness and the Law* (1995) at 213.

⁵⁴ Parts of this short chapter have been published as part of the article: E Couzens ‘The Problem that Categorisation of Species in MEAs Poses for the Protection of Biodiversity’ in E Couzens & T Kolari (eds) *International Environmental Law-making and Diplomacy Review 2006* (2007) 185 at 189-194; available at www.joensuu.fi/unep/envlaw.

⁵⁵ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 648-9.

⁵⁶ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 71-74.

⁵⁷ *Ibid* at 71-74. ‘For the British’, says Sands, ‘freedom of navigation on the high seas included the right to take all the fruits of the sea. Specifically, it allowed the hunting of fur seals while they were making their annual migration from Alaska to the Pribilof Islands each spring. ... Between 1868 and 1897 the reported catch of Pribilof seals on land was 2 440 213, with more than 650 000 being taken by pelagic sealing, although this number is almost certainly underestimated’. *Ibid* at 71-74.

their life cycles on the (US) Pribilof Islands - even where these seals were temporarily outside the three-mile limit of the US territorial sea.⁵⁸ While inside the three-mile limit, it was not disputed that the US could protect the seals. However, following its annexation of Alaska [ceded by Russia in 1867], the US began to claim exclusive jurisdiction over the seals, allegedly for conservation purposes. Foreign vessels ignored the claim and continued to take seals beyond the American three mile limit.⁵⁹

The US decided to arrest British ships sealing on the high seas. It seems that in 1886 the US seized three British schooners which were sealing some 60 miles from Alaska. After Britain protested, the US released the vessels. Three years later, however, the US stopped five more British ships and ordered three others to leave the Bering Sea.⁶⁰

2.3.2 *The tribunal and the arguments*

The matter was then, in 1892, put to an arbitral tribunal⁶¹ for decision. The US claimed that it had, in international law, both a property right in the seals, as well as the right to protect them for the benefit of humankind generally. In support, the US invoked 'the practice of nations, the laws of natural history and the common interests of mankind' arguing that it alone had the power to preserve the seals, as a trustee 'for the benefit of mankind'.⁶²

In Birnie and Boyle's words 'the US regarded itself as the trustee of the herd for the benefit of mankind'. Britain (for Canada), however, countered that it had the right to hunt seals on the high seas; they being 'either *res communis* or *res nullius* in status, not the exclusive property of the US'. The US countered to this that the high seas were 'free only for innocent and inoffensive use, not injurious to the just interests of any nation which borders upon it', and also that the seals had an *animus revertendi*, returning cyclically to US territory, and were thus to be equated to domestic animals which could be the subject of property rights.⁶³

'The arbitral tribunal', continue Birnie and Boyle, 'found against the US arguments' and 'held that as Britain had protested against the Russian decree, Russia had neither held nor exercised exclusive rights in the Bering Sea beyond areas of national jurisdiction'. Thus the US 'had not acquired such rights from Russia, had no property rights in the seals and no right to protect them beyond the three-mile limit. Freedom of the high seas was held to be the prevailing doctrine'.⁶⁴ The tribunal held (with two arbitrators dissenting) that the US had no right of property or protection in the fur seals beyond the three mile limit and that it could not

⁵⁸ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 649.

⁵⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 94.

⁶⁰ J Joy 'Conservation or the Cannon-Shot Rule' *White, Ottenheimer & Baker: Barristers & Solicitors* June 2001 <http://www.wob.nf.ca/News/2001/conservation.htm> (accessed 30 October 2002).

⁶¹ The Tribunal had seven members. Two were nominated by the US (a Supreme Court judge and a senator) and two by Britain (the Minister of Justice and the Attorney General for Canada); while the President of France nominated an Ambassador of France; the King of Italy nominated a former Minister of Foreign Affairs; and the King of Sweden and Norway nominated the Minister of State. 'Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the preservation of fur seals' *Reports of International Arbitral Awards Vol XXVIII* 263-276 (award 15 August 1893) http://untreaty.un.org/cod/riaa/cases/vol_XXVIII/263-276.pdf.

⁶² P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 71-74.

⁶³ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 649.

⁶⁴ *Ibid* at 649.

therefore exploit or conserve the seals exclusively.⁶⁵ The tribunal recommended nine measures for joint regulation by Great Britain and Canada of the seal fisheries in the Bering Sea.⁶⁶

The arbitration tribunal's 1893 ruling is not the end of the importance of the matter. Britain and the US had agreed beforehand that if the US lost the case the arbitral tribunal should suggest new international rules to conserve the seals. The arbitral tribunal, therefore, proposed arguably the first rules of modern international conservation law, regulating when and where seals could be captured. This 'first environmental case' revealed, Sands argues, an 'American desire to put conservation above economic interests. It also reflected a willingness on the part of both countries to restrict traditional sovereign freedoms with new rules of international law'.⁶⁷

This is an interesting early example - in fact, you could hardly find earlier - of the United States 'going it alone' ... 'for others' benefit'! It must be argued, however, that if it is Sands' contention that the Americans 'desired to put conservation above economic interests', then this would be putting American philosophy (philanthropy?) far too strongly. The US was surely protecting a resource for itself. The fur seals did represent an important economic resource; and one over which the US may have felt it had a special proprietary interest.

Support for my contention of American cynicism can perhaps be found in the fact that, after losing the arbitral panel's decision, the US went on - in 1902 - to use the same arguments as the British had put forward in an arbitration with Russia, after Russia had seized American vessels fishing outside of the Russian territorial sea.⁶⁸

2.3.3 The importance of the arbitral award

According to Joy, '[u]ntil the end of the 19th Century, coastal states argued in favour of maintaining traditional fishing rights on economic grounds. With the Bering [Sea] Fur Seals Arbitration the world entered the era of fishery conservation'.⁶⁹

Birnie and Boyle emphasise that '[t]he importance of this decision to the development of the law concerning conservation of marine living resources cannot be overstressed'. According to these writers, the decision 'laid the twin foundations for subsequent developments over the next century' in the sense that, firstly, 'it confirmed that the law was based on high seas freedom of fishing and that no distinction was to be made in this respect between fisheries

⁶⁵ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 99-100.

⁶⁶ These measures, per Birnie, have now become:

a familiar set of weapons in the armouries of most fisheries commissions viz. a prohibited zone; a closed season in a defined area of the high seas; a limitation on the type of vessels used; licensing by the national governments concerned; use of a special identifying flag while sealing; keeping catch records; exchange between the two governments of data collected by them; prescription of certain kinds of gear; and government responsibility for selection of suitable crews for sealing. There was even a specific exemption in favour of sealing by indigenous Indians as long as it was for traditional purposes and the used traditional methods.

Ibid at 99-100.

⁶⁷ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 71-74.

⁶⁸ J Joy 'Conservation or the Cannon-Shot Rule' *White, Ottenheimer & Baker: Barristers & Solicitors* June 2001 <http://www.wob.nf.ca/News/2001/conservation.htm> (accessed 30 October 2002).

⁶⁹ *Ibid*.

and marine mammals despite the very different characteristics of the latter, which the tribunal had examined'; and, secondly, that the decision 'recognized the need for conservation to prevent over-exploitation and decline of a hunted species, but because of the former finding, it made this dependent on the express acceptance of regulation by participants in the fishery'.⁷⁰

The regulations suggested by the Arbitral panel, to be binding on the US and Great Britain, included that there should be no capture or pursuit of fur seals within a 60 mile zone around the Pribilof Islands;⁷¹ that there be a closed season, between 1 May and 31 July;⁷² and that the regulations should not apply to 'Indians dwelling on the coast of the territory of the [US] or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats ... propelled wholly by paddles, oars or sails and manned by not more than five persons each ...'.⁷³ These three restrictions, in particular, it can be argued, lead to a 'categorisation' effect - especially of the particular animals taken.

It is interesting to see this arbitration as having been an early model for the International Convention for the Regulation of Whaling (ICRW) - or at least as an important stepping stone toward that agreement. The eventual moratorium on commercial whaling agreed to by the International Whaling Commission in 1982 being, perhaps, the most important eventual consequence. Generally, the history of multilateral conservation agreements has, though, seen the international community limping slowly and painfully toward better understanding. Birnie argues, in fact, that '[t]he eventual solution of this dispute has had a profound effect on management of marine species, especially on the management of whales, since the Treaty that was eventually concluded between the participants in this fishery became in part a model for the [IWC] when it was founded in 1946 and was also the model for many other fisheries commissions'.⁷⁴

Birnie writes, further, that '[t]he award pioneered the pattern of modern fisheries regulation, including the system adopted in the ICRW'.⁷⁵ The point is that, whilst upholding the idea of high seas freedom and rejecting the US claim that it had the right to exercise conservation measures beyond its territorial waters, the award 'supported voluntary restraints on freedom of fishing and laid down appropriate international measures'.⁷⁶

Birnie and Boyle suggest that 'although it perpetuated the high seas freedom of fishing and hence made conservation more difficult, especially in relation to enforcement', the *Bering Sea* arbitral tribunal did also strongly support the need for minimum exploitation and the taking into 'reasonable account' of the interests of other states.⁷⁷

⁷⁰ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 649-50.

⁷¹ Article 1; T Kuokkanen (ed) *Seminal Cases of International Environmental Law* (1999) at 17.

⁷² Article 2; *Ibid* at 17.

⁷³ Article 8; *Ibid* at 17.

⁷⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 92.

⁷⁵ *Ibid* at 100-101.

⁷⁶ *Ibid* at 100-101.

⁷⁷ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 650.

The importance of the award lay in its international stature. There *had* been earlier moves toward some of the conservation provisions suggested. The close season, for instance, had been suggested in the early 1870s in regard to seals in Greenland. At the time, approximately 80 000 saddle back and hooded seals were being slaughtered annually. The death toll was much higher, as many pups were left orphaned. Sutherland writes that '[i]n 1876 an international close time was established prohibiting the killing of seals before 3 April', from 1877.⁷⁸ None of these earlier moves received the attention - nor provided the precedent value - that the *Bering Sea Fur Seals Arbitration* did.

In the result, however, the legacy of the *Bering Sea Fur Seals Arbitration* must be seen as having been a mixed one. It entrenched freedom of the high seas and thereby made it that much more difficult to bring an end to the rampant destruction of whale populations; and left us to this day labouring under the weight of the impression many important actors have, that they can do as they please with natural resources on the high seas. At the same time, many of the principal 'tools' we use even today to give content to management systems protective of wildlife have their origins in the arbitral award. These 'tools' particularly include close seasons, restrictions on certain weapons, exemptions for certain classes of people, and so forth.

2.3.4 *The lessons not learned*

In the short-term, the *Bering Sea Fur Seals Arbitration* did not meaningfully assist the fur seals themselves. This could hardly be otherwise, as it was essentially nothing more than a contract between two countries - and these were only two of the four states engaged in hunting the Bering Sea fur seals; Russia and Japan being the others. In fact, some US and Canadian vessel owners apparently re-registered their vessels under Japanese and other flags to evade the US and Canadian regulations. The dramatic decline in seal stocks in the area continued until it was eventually realised by all the participants in the slaughter that only the conclusion of an international regulatory treaty among all states involved in the sealing could save them. This cycle of events, comment Birnie and Boyle, 'has been repeated in almost all exploited fisheries'.⁷⁹ Unfortunately, this cycle of overexploitation has yet to be recognised on the global scale. In this sense, we have not learned all that we could from the arbitral award.

It is, further, only certain states that can truly make maximum use of their freedom of the high seas. By way of conclusion, Dahmani comments that '[b]y the end of the 18th century, the freedom of the high seas [had] established itself as a fundamental principle to justify any use of the seas'; and that '[i]n so far as the fishery resources of the sea were concerned, as long as those resources were believed to be inexhaustible, no form of regulation or restriction upon the freedom of the seas could be justified'.⁸⁰

Ultimately, in the absence of a considerable body of international case law, international commentators must make much of the few cases - or arbitrations - which there are. The

⁷⁸ G Sutherland *The Whaling Years: Peterhead (1788-1893)* (1993) at 91-93.

⁷⁹ P Birnie and A Boyle *International Law and the Environment* (2nd ed, 2002) at 650.

⁸⁰ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 1-2.

precedent value of the *Bering Sea Fur Seals Arbitration* is immense - as it set the scene for accepted status of the high seas as 'open access' areas. The scene was therefore set for lack of control over fisheries generally, which lack of control persists; and over whaling, which resulted in incredible damage being done to most of the great whales and the creation of the ICRW, the eventual 'moratorium' on commercial whaling, and the current controversy. The arbitral ruling therefore provides a very useful starting point for understanding the histories of whaling and of fishing.

2.4 The historical bases of the two Conventions: CITES, the ICRW and categorisation⁸¹

2.4.1 The London Convention of 1900

Curiously from a modern perspective, the British chose to be markedly influenced by the Germans (via East Africa) in their choices in regard to conservation measures in the 1890s.⁸² The conclusion of an 'acceleration' of conservation measures in British and German territories in the 1890s, and cooperation between the British and the Germans, culminated in the Convention on the Preservation of Wild Animals, Birds and Fish in Africa - signed in London on 19 May 1900.⁸³ This Convention emerged from a German-proposed Conference and suggested that all colonial powers should introduce game regulations. Most parties never ratified the Convention, but the Germans and British did so 'enthusiastically'.⁸⁴ It was important for certain African countries, German and British colonies in particular, because Germany and Britain - as co-sponsors of the Convention - ratified it and attempted to give it expression in their colonies.

The agreement aimed at preventing uncontrolled massacres of wild animals and ensuring the conservation of diverse wild animal species.⁸⁵ It set up a selected mechanism for the protection of 'useful' or rare and endangered wild animal species and the sufficient reduction of 'pest' species.⁸⁶ It also encouraged signatories to engage in the creation of 'reserves'.⁸⁷ Most of its signatories did not ratify it and the Convention never entered into force. It is unknown whether this was because the provisions were too strict for them; or whether their failure was for undisclosed political reasons. However, this first initiative was not worthless. It helped some signatories to enact legislation related to the protection of wild fauna in their respective colonial territories.⁸⁸

⁸¹ Parts of this short chapter have been published as part of the article: E Couzens 'The Problem that Categorisation of Species in MEAs Poses for the Protection of Biodiversity' in E Couzens & T Kolari (eds) *International Environmental Law-making and Diplomacy Review 2006* (2007) at 185-216; available at www.joensuu.fi/unep/envlaw.

⁸² J M Mackenzie *The Empire of Nature* (1988) at 205.

⁸³ IUCN Environmental Law Programme *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* IUCN Environmental Policy and Law Paper No. 56 (2004) at 207-209. Convention on the Preservation of Wild Animals, Birds and Fish in Africa - signed in London on 19 May 1900.

⁸⁴ J M Mackenzie *The Empire of Nature* (1988) at 208.

⁸⁵ Preamble; see IUCN Environmental Law Programme *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* IUCN Environmental Policy and Law Paper No. 56 (2004) at 207-209.

⁸⁶ Articles II(1), II(13) and II(15); see *ibid* at 207-209.

⁸⁷ Article II(5); see *ibid* at 207-209.

⁸⁸ *Ibid* at 207-209.

Parker writes that '[s]urprising many modern conservationists, the London Convention listed animals which might not be killed under any circumstances, decreed the protection of immature and female animals, ordered the setting aside of reserves, called for the strict regulation of trade in game products and many other restrictions besides'. 'In principle', comments Parker, 'little new emerged over the subsequent hundred years'.⁸⁹

Given the similarities to the management regime suggested by the Arbitral tribunal in the *Bering Sea Fur Seals Arbitration*, these ideas ought not really to be seen as 'surprising'. Parker's judgment that little has changed since is, though, probably not harsh. Conservationists worldwide, certainly as reflected in international conventions currently in force, still categorise species.

2.4.2 *The Paris Convention of 1902*

The Convention for the Protection of Birds Useful to Agriculture, which was signed in Paris on 19 March 1902, categorised certain birds as being useful to man for agricultural purposes; and categorised certain other bird species as 'noxious'. This was done largely on the basis of which species were seen as being useful because insectivorous and therefore able to assist man in the protection of crops; and those which were seen as competing with man's interests, or competing with bird species useful to man. Ironically, many of these 'noxious' birds are the species to which we today give special protection.

Glavovic writes that the earliest bird-related treaties had 'as their purpose the prohibition of the killing, capturing or trading of birds of agricultural value'; with birds of prey being regarded 'as noxious and not worthy of protection'.⁹⁰ Article I of the 1902 Convention provided that birds useful to agriculture, 'particularly the insect-eaters and namely those birds enumerated in the first Schedule attached ... shall be unconditionally protected by a prohibition forbidding them to be killed in any way whatsoever, as well as the destruction of their nests, eggs and broods'.⁹¹

Schedule I is entitled '[u]seful birds'.⁹² It is Schedule II, entitled 'noxious birds', which makes for staggering reading for the modern environmentalist, as many of them are today given significant protection. Consider the following list of bird species which people were encouraged to exterminate:

Birds of prey: bearded vulture; eagles, all kinds of; sea eagles, all kinds of; osprey; kites, black-shouldered kites, swallowtailed kites; falcons, gyr-falcons, peregrine falcons, hobby, merlin-stone falcon, all sorts of; common goose-hawk; harriers. Owls: eagle owl. Perching-birds: raven; magpie;

⁸⁹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 42.

⁹⁰ P D Glavovic *Wilderness and the Law* (1995) at 214.

⁹¹ Convention for the Protection of Birds Useful to Agriculture, Paris, 19 March 1902, see text at http://eelink.net/~asilwildlife/bird_1902.html.

⁹² Schedule I contains the following species:

Night birds of prey (owls):

little owl; pygmy owl; hawk owls; tawny owl; barn owl; short-eared owl; long-eared owl; small tufted owl. *Picariae*: woodpeckers. *Syndactyles*: common roller; bee-eater.

Perching birds:

hoopoe; tree-creeper; wall-creeper; nuthatch; swift; nightjar; nightingale; blue-throat; redstart; red-breast; furze-chart; wheatear; accentor. *Sylvinae*: common warbler; lesser white-throat; common tree-warbler; aquatic warbler; great warbler; reed warbler; sedge warbler; grasshopper warbler; fantail warbler; willow warbler; gold-crested wren, wren; titmice; flycatcher; swallows; wagtails; pipits; cr[oa]ssbill; bunting; serin; goldfinch; siskin; starling; rose-coloured starling; white and black storks.

common jay. Herons: grey and purple herons; bittern; night heron. Swimming birds: pelican; cormorant; smews; divers.

Ultimately, the ‘shortcomings’ of the 1902 Convention ‘and concern over increasing threats to birds in Europe produced a series of conferences’ which, Glavovic explains, resulted in its being superseded in 1950 by the International Convention for the Protection of Birds. This latter Convention ‘also went beyond simply regulating the killing, capturing and trading of birds, but encouraged Parties to promote conservation education and to establish protected areas’.⁹³ This second Paris Convention, which entered into force in 1963, suggested, in its Preamble, that its signatory Governments considered that ‘in the interests of science, the protection of nature and the economy of each nation, all birds should as a matter of principle be protected’.⁹⁴

Two important shifts were represented by this; these being a shift in perception of the value of birds, and a shift in focus from species protection to habitat protection.

It has taken humankind a very long time to reach our current understanding of the complexities of species interrelationships; and it would be dangerously arrogant to make the assumption that our current understanding is correct. Probably at the time of the drafting of the first Paris Convention scientists had similar confidence in their understanding to that which scientists have today. What understanding we will eventually come to have is impossible to know; and caution is therefore essential.

2.4.3 The South African experience

An example, in the South African context, of how understandings of the complexities inherent in managing biological diversity have changed can be seen from the appointment, in 1902, of Major James Stevenson-Hamilton as the warden of the Sabi Game Reserve in South Africa - the game reserve that was eventually to become the Kruger National Park. In his lengthy period as warden, especially in the earlier years, Stevenson-Hamilton shot over 300 lions; as well as innumerable leopard, wild dog, cheetah, hyena, and other carnivores. The object was to enable the herbivores, the prey species, to increase their numbers. It seems that soon after his arrival Stevenson-Hamilton wrote: ‘I think the carnivora should be reduced’; with his first aim being ‘to restore the proper game balance’.⁹⁵ ‘In those early days’, according to Meiring, ‘lion were officially regarded as vermin ... because there were so many of them in the Park’.⁹⁶

To his credit, Stevenson-Hamilton realised eventually, through experience, that healthy ecosystems require natural balances of predators and prey; with the predators and scavenger-hunters weeding out those prey animals which become older, injured, or diseased. This approximates far more to our current understanding.

⁹³ P D Glavovic *Wilderness and the Law* (1995) at 214.

⁹⁴ See the International Convention for the Protection of Birds, signed at Paris, 1950, in force 17 January 1963 (signed by Austria, Belgium, Bulgaria, France, Greece, Monaco, The Netherlands, Portugal, Spain, Sweden, Switzerland, and Turkey). Available at <http://fletcher.tufts.edu/multi/texts/BH255.txt> (accessed 4 August 2008).

⁹⁵ P Meiring *Behind the Scenes in Kruger Park* (1982) at 23.

⁹⁶ *Ibid* at 44.

2.4.4 *The 1933 London Convention*

Following the failure of the London Convention of 1900, which never came into force,⁹⁷ an international congress on the protection of nature was held in Paris in 1931 to propose the convening of an international conference for the adoption of a new text. On 8 November 1933, the Convention Relative to the Preservation of Fauna and Flora in their Natural State was adopted. The new London Convention came into force on 14 January 1936.⁹⁸

Compared to its predecessor, the scope of the Convention was extended markedly - to include plants even. Its objective remained utilitarian - to preserve supplies of species which were economically valuable and popular with trophy hunters. In this regard, it provides a list of plant and animal species that were selected either to receive absolute protection (class A) or a lower level of protection (class B). The Convention, however, took a bold step into the future by rejecting the concept of nuisance species. It was also the first binding instrument, binding on the states which adopted it at least, to provide for the creation of protected areas in Africa - such as national parks and nature reserves.⁹⁹

2.4.5 *The International Convention for the Regulation of Whaling*

In 1946 fifteen whaling nations created the ICRW; with its managing body, the International Whaling Commission, which would meet annually to determine quotas for the parties - which quotas the parties would then, for decades, largely ignore. As well as setting quotas within species, the parties, through the Commission, then listed certain species to which the Convention would apply.¹⁰⁰ The Convention does not apply to so-called 'small cetaceans'.¹⁰¹

Mulvaney and McKay argue that 'small cetacean' is not a strictly biological term, but rather a political construct. Its genesis, they say, 'lies in [the] seemingly innocuous list of species appended to the 1946 [ICRW]'.¹⁰² Where the legal basis for excluding species is that they were not initially listed; this must be considered as, at best, spurious.¹⁰³ Komatsu and Misaki tell us that '[t]he list was developed soon after the IWC was established when member countries said species needed to be listed for management purposes'.¹⁰⁴ It might even be, according to the

⁹⁷ See, for instance, S Lyster *International Wildlife Law* (1985) at 113.

⁹⁸ IUCN Environmental Law Programme *An Introduction to the African Convention on the Conservation of Nature and Natural Resources* IUCN Environmental Policy and Law Paper No. 56 (2004) at 3.

⁹⁹ *Ibid*; see also http://www.fco.gov.uk/Files/kfile/021_FaunaFlora.pdf. The Convention was signed by Belgium, Egypt, France, Italy, Portugal, South Africa, Spain, Sudan, and the UK; India and Tanzania later acceded.

¹⁰⁰ According to the 'Annex of Nomenclature of Whales' which the Contracting Governments agreed to in 1946, 16 species of whale are listed. Some of the species have more than one name - the gray whale, for instance, has eight (gray whale, gray back, California gray whale, Pacific gray whale, Devil fish, hard head, mussel digger, rip sack) - and they are listed here according to the name I have taken to be presently the most commonly used; in the order they appear on the Annex.

Bowhead, right whale, North Atlantic right whale, Southern right whale, pygmy right whale, humpback whale (two species, per the Annex), blue whale, fin whale, sei whale, Bryde's whale, minke whale, gray whale, sperm whale, Arctic bottlenose whale, and Antarctic bottlenose whale. IWC 'Annex: Nomenclature of Whales' 1946.

¹⁰¹ Dolphins, pilot whales, porpoises, etc.

¹⁰² K Mulvaney & B McKay 'Small Cetaceans: Status, Threats, and Management' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 189 at 189-90. See (n 100).

¹⁰³ *Ibid* at 189-90.

¹⁰⁴ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 32.

same writers, that the Baird's beaked whale, for instance, was omitted from the list because it was simply not known to Western nations - being hunted in Japan only.¹⁰⁵

What this categorisation of species has led to is a situation where certain species are hunted, and others not. As an example of the arbitrary nature of such selection, the northern bottlenose whale is not considered a 'small cetacean'; while the, larger, Baird's beaked whale *is* so considered.¹⁰⁶

The hunting of small cetaceans is one of the more controversial aspects of the regulation of whaling by the International Whaling Commission. While the matter is not officially under the auspices of the IWC, according to the terms of the ICRW, member states opposed to the hunting of small cetaceans have succeeded in having the matter put on the agenda for discussion at each annual meeting. While there is no way, in international law, for those opposed to the practice to stop it; they do put public pressure on those countries - such as Japan and the Faroes - which do practice such hunting.

2.4.6 The Convention on International Trade in Endangered Species, and problems with its approach

As will become apparent, CITES is ostensibly a protectionist treaty - and quite firmly rooted in the emerging environmental discourse of the early 1970s. However, the implicit recognition that trade is a reality (and is 'here to stay') leads one to the inevitable conclusion that the treaty is also a trade treaty - a 'regulation of trade' treaty.

This is a problematic approach for a treaty that is, at least in part, intended to be protective of species and of biological diversity. The treaty takes a fairly rigid approach toward categorising species; and yet, having only extremely limited internal jurisdiction, does not acknowledge that species might depend upon other species, in properly functioning ecosystems, for survival. There are numerous related problems; such as that of so-called 'lookalike' species - where species in desperate need of protection might not receive it due to being confused with species not in such need.

2.4.7 Categorisation of species under CITES

Article II is headed 'Fundamental Principles' and what this Article does is create the three Appendices into which listed species are placed, or categorised, and in terms of which they are thereby afforded different degrees of protection against overpopulation in trade. Article I.1 states that Appendix I species include all species threatened with extinction which are or may be affected by trade. Trade in these specimens 'must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorised in exceptional circumstances'. Article I.2 states that Appendix II includes all species which might become threatened with extinction unless trade in specimens of such species is subject to strict regulation 'in order to avoid utilisation incompatible with their survival'; and also other

¹⁰⁵ *Ibid* at 32.

¹⁰⁶ K Mulvaney & B McKay 'Small Cetaceans: Status, Threats, and Management' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 189 at 189-90.

species which ‘must be subject to regulation in order that trade in specimens of certain species (as referred to in (a)) may be brought under effective control’.

Article I.3 states that Appendix III includes ‘all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing of restricting exploitation, and as needing the cooperation of other Parties in the control of trade’. Article I.4 then regulates Articles I.1, I.2 and I.3 by providing that ‘the Parties shall not allow trade in specimens of species included in all three Appendices, except in accordance with the provisions of [CITES]’.¹⁰⁷

2.4.8 The categorisation idea

Arising from consideration of the *Bering Sea Fur Seals* ruling, and a necessarily brief (at this stage) look at the way in which the ICRW and CITES operate, it is apparent that the idea of categorisation of species is dominant. Historically, the protection of wildlife species has operated on a strict system of classification according to perceived levels of danger to populations of particular species.

Essential historical understanding can be drawn from, especially, the London Convention of 1900 and the Paris Convention of 1902. These two Conventions make rigid distinctions between species - setting the scene for the approach adopted by both the ICRW and CITES. This approach arguably makes it extremely difficult to use elderly MEAs to protect species and biological diversity generally - in the face of our current, much improved, understanding of intra- and inter-species relationships, ecosystems, and biodiversity.

¹⁰⁷ See [Annex B](#).

3 The first old watchdog: the ICRW

3.1 The early history

As an interesting aside with which to begin discussing the ICRW and CITES, both can be referred to as ‘the Washington Convention’ as this is the city where each was originally adopted - in the years 1946 and 1973 respectively.

3.1.1 Early efforts to regulate whaling

At least brief description of the lengthy history of whaling - before considering international efforts to regulate whaling - is necessary. Although much written of, and thus common knowledge, the sheer effort inherent in whaling cannot fail to shock. Creighton, for instance, writes that ‘[d]uring the peak of American whaling, in the middle of the nineteenth century, nearly 700 whaleships, carrying 200 000 men, might be found at sea in a given year’.¹⁰⁸ Melville wrote in *Moby Dick* that ‘whalemen of America now outnumber all the rest of the banded whalemen in the world; sail a navy of upwards of seven hundred vessels; manned by eighteen thousand men; yearly consuming 4 000 000 of dollars; the ships worth, at the time of sailing, \$20 000 000; and every year importing into our harbors a well reaped harvest of \$7 000 000’.¹⁰⁹ According to Nikonorov, the ‘American whalers investigated practically every corner of the World Ocean. During the first three quarters of the [19th C]entury only they harvested nearly 200 000 right whales and since 1835 to 1872 - totally about 300 000 whales of different species (bowhead, right, gray and sperm whales)’.¹¹⁰ That, of course, describes only the United States! Gradually, whale populations were ‘mined out’ of the world’s seas; much as was eventually to happen to mammals in Africa and in the United States.¹¹¹

Martin writes, of the earliest attempts to regulate whaling, that ‘[m]any nations, such as Britain, Norway and Australia, had in fact developed a range of legislation and licence agreements in an attempt to manage or exert some form of control over whaling within their territorial seas or on vessels that used their ports. But these had no effect in international waters’. Despite being largely ineffectual; the establishment of early international controls over whaling was eventually to have an important effect, being a response to the pattern of exploitation of the world’s whale resources.¹¹²

An early body which had an important influence, providing much of the early research into whaling, was the International Council for the Exploration of the Sea (ICES) - which was established in 1902.¹¹³ It seems that in 1911, according to Martin, the suggestion of putting

¹⁰⁸ M S Creighton *Rites and Passages: The Experience of American Whaling, 1830-1870* (1995) at 16.

¹⁰⁹ H Melville *Moby Dick* (1994 (1851)) at 117.

¹¹⁰ I V Nikonorov *Whale Mystery: A Review* (1996) at 7.

¹¹¹ As Mackenzie has written, ‘the game was simply worked out like a mineral seam’. J M Mackenzie *The Empire of Nature* (1988) at 116.

¹¹² S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 80-83.

¹¹³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 107-109. According to Birnie ‘ICES co-operated with the League of Nations in the preparation of a Conference in 1930 to promote the rational exploitation of the seas’ resources, proposing in 1929, after far-reaching discussions on the state of stocks, that those countries interested in whaling should “as a matter of

international agreements in place to govern whaling was raised by staff of the Natural History Museum, London; with further suggestions being made by way of a French proposal in 1913, by those concerned by whale hunting off Congo (then by a French territory). ‘By and large’, Martin comments, ‘these attempts were not fruitful, but they mark the beginning of work which continued throughout the period of modern whaling’.¹¹⁴ It appears that in 1924 the Assembly of the League of Nations initiated an inquiry into international law generally, and this led to a discussion draft; the draft being based on regulations that the Norwegian Government had established for Norwegian whalers.¹¹⁵ Martin describes the effort as being ‘another fruitless attempt, almost impossible to police’, but contends that it marked another point in the ‘long struggle to exert some form of management over whale stocks’. In 1931, he explains, the Convention for the Regulation of Whaling (CRW), an agreement supported by the League of Nations, was opened for signature. However, it was not until considerably later - 1935 - that the CRW actually came into force.¹¹⁶

It seems that the real importance of these early efforts was that, as with so much international environmental law, they provided basic starting points, building blocks; rather than that they were themselves binding law. The next important step would come in 1937; when a number of whaling nations signed the International Agreement for the Regulation of Whaling.¹¹⁷

The 1931 Convention did come into effect; in 1935, after ratification by eight states ‘which had to include Great Britain and Norway’.¹¹⁸ Although the Convention did, for the first time, attempt to extend its scope to ‘all the waters of the world’; Birnie comments that ‘[o]verall, ... the conclusion that the Convention “did little more than rally the support of nations in the

urgency give serious consideration to the question of taking immediate temporary measures for dealing with the situation’...’. *Ibid* at 107-109. ‘ICES [existed]’, Birnie says, ‘without a formal constitution ... until 12 September 1964, that prescribed its purposes to be promotion of research for the study of the sea ... It is still limited to the Atlantic and its adjacent seas, ... ICES is still very much concerned with collaboration with other organisations’. *Ibid* at 288-89. For insight into ICES’ present work, see, generally, <http://www.ices.dk>; or <http://www.marine.gov.uk/ICES.htm>.

¹¹⁴ S Martin *The Whales’ Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 80-83.

¹¹⁵ *Ibid* at 80-83. Per Martin again, ‘[t]he convention covered all the waters of the world, including the high seas and territorial waters. It applied to all baleen whales ... and forbade ‘absolutely ... the taking or killing of species which have become very rare, calves or immature whales, and females accompanied by sucklings’ ... The fullest possible use was to be made of the carcass’. *Ibid* at 80-83. ‘These ideas’, per Birnie, ‘echo those of the 1900 London Convention, and the *Bering Sea Fur Seals Arbitration*; and prefigure the aboriginal whaling exemptions in the ICRW’. P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 115, fn 39.

¹¹⁶ S Martin *The Whales’ Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 80-83. Per Martin, ‘[t]he ‘main object’ of the CRW, a 1931 League report stated: “is to secure the adoption by the greatest possible number of countries of certain rules intended to prevent the destruction of wealth available to all’’. *Ibid* at 80-83. This clear object - and description of whales as ‘wealth available to all’ - prefigures and is echoed in the ‘clear object’ of the ICRW.

¹¹⁷ *Ibid* at 80-83.

¹¹⁸ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 116-117. ‘It was signed by 26 states, eight of which did not ratify it, and it was subsequently adhered to by ten others. These non-participants, however, included those states which became particularly important as they began to develop their industries: viz. Japan, Germany (which signed but did not ratify), Chile, Argentina and Russia. Even so, the Convention had much wider membership than for many years did the 1946 ICRW’. *Ibid* at 116-117. The Convention was ratified by Canada, Denmark, Finland, France, Italy, Mexico, Netherlands, New Zealand, Norway, Poland, Spain, Switzerland, Union of South Africa, United Kingdom, United States, Turkey and Yugoslavia, and subsequently adhered to by Brazil, Ecuador, Egypt, Eire, Great Britain (for its colonies), Latvia, Monaco, Nicaragua, Newfoundland, and Sudan. Albania, Australia, Belgium, Columbia, Germany, Greece, India and Rumania signed but did not ratify the Convention. *Ibid* at 116, fn 42.

cause of conservation” is a fair one’.¹¹⁹ Scarff agrees; writing that ‘[t]he first Convention for the Regulation of Whaling, signed on September 24, 1931 was, at best, a very tentative step towards conservation. At worst, it was a complete whitewash of the problem’.¹²⁰ It did, however, in its failure lead to a different form of international ‘agreement’ - independent regulatory efforts by the industry itself.¹²¹

Komatsu and Misaki provide a different - and more cynical - interpretation of the motives of the traditional powers; recording that the two leading whaling nations before the Second World War were Great Britain and Norway, with Norway sending its first whaling mother-ship factory fleet to the Antarctic in 1925, and Great Britain soon following. In 1930, they write, the two countries ‘expressed the danger of mounting competition for hunts of blue whale resources in the Antarctic’; and record that ‘through the League of Nations, they called for an assembly of experts on whale resource management’. In 1931, the Geneva Convention (the ‘Convention for the Regulation of Whaling’) was enacted, which attempted to make ‘whaling nations responsible for reporting their catches to the International Bureau of Whaling Statistics. This resulted in effective control of the whaling operations in the ensuing years’. Significantly, in 1932 an International Agreement for Whale Oil Production was agreed to; which Agreement led directly to the introduction of a whale quota system set by way of a model known as the ‘Blue Whale Unit’ or BWU.¹²²

As will be seen, the charge that the traditional powers intended to regulate whaling in order to preserve oil price controls has been made on numerous occasions; and by analysts from all sides of the debate. Friedheim, for instance, describes ‘[t]he history of industrial whaling [as being] a record of extraordinarily rapacious behavior’ and writes that the 1931 convention was the first ‘modern’ effort at managing whales; describing it as being ‘characteristic of early attempts to manage common property resources. It tried to regulate the taking of whales without seeking to solve the open entry problem’.¹²³ Birnie tells us that ‘[i]n 1936 discussions

¹¹⁹ *Ibid* at 117-118.

¹²⁰ J E Scarff ‘The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)’ (1977) 6 *Ecology Law Quarterly* 323 at 349-350.

¹²¹ *Ibid* at 350. Scarff explains that ‘[t]he failure of governments to achieve an international agreement led to independent efforts by the whaling companies to regulate the industry themselves. The companies were motivated less by a desire to save whales than by a desire to increase profits. In the summer of 1932, all the major whaling companies joined in an agreement to limit the production of whale oil. Individual companies were assigned harvest quotas to limit the amount of oil each company could place on the market. Quotas could only be made operational in terms of the number of whales killed. To solve this problem, the companies devised a “blue whale unit” ... This cartel lasted two years’. *Ibid* at 350. Strangely, it does appear that it was private, independent whaling companies that initially came up with the BWU concept - assigning themselves harvesting quotas in 1932 on the basis of the quantities of oil that they contributed to the market. Initially, one blue whale was considered the equivalent of three humpback or five sei whales. As quotas became increasingly difficult to negotiate, however, the cartel broke down by 1934/5. *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume 1* (1978) at 28. It has also been suggested that the BWU was introduced, in 1939, by the Bureau of International Whaling Statistics as a way to gauge the catches of various species. *Ibid* at 43. The ‘BWU’ is explained later in this thesis - see (n 182) and (n 192).

¹²² M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 77-79. The Convention applied only to baleen whales, and gave limited protection to ‘immature, undersized’ whales (without defining these); no quotas were set and no other limitations were placed on times or methods of taking whales. Interestingly, the Convention is technically still in force - and, by 1976, 47 States had signed it. *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume 1* (1978) at 28-29.

¹²³ R L Friedheim ‘The IWC as a Contested Regime’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 30-31. The thinking here is clearly reminiscent of the *Bering Sea Fur Seals Arbitration* and the London Convention; particularly in that regulation was done also ‘by other “biological” standards. The convention established “seasons,” exempted the taking of females accompanied by calves, and established size limits’. Friedheim then tells us that ‘... [t]he

were initiated for a more effective quota agreement. For the first time governments joined the companies in the negotiations';¹²⁴ and that '[i]n 1937 an international convention was at last negotiated which improved upon the 1931'. This convention was, however, valid for only one season.¹²⁵ A subsequent, follow-up conference was then convened in 1938; which was attended by the 1937 participants and also by Japan, Denmark and France.¹²⁶ In 1944 the conference reconvened.¹²⁷ After the Second World War, in 1945, the United Kingdom convened a conference in London; with such issues as the creation of a Standing Commission, confiscation of oil taken illegally by non-party states, and the forbidding of imports and sales of whale products by non-party states. These ideas, per Birnie, presaged the regime that was eventually to be adopted under CITES.¹²⁸ Already, ideas of conservation of stocks relied upon trade controls and restrictions put in place in early whaling-related international thinking - foreshadowing the eventual promulgation of CITES. In this sense, then, the ICRW and CITES can be seen as having been similar from their very beginnings.

3.1.2 *The creation of the ICRW*

The International Convention for the Regulation of Whaling is the Convention signed into being in 1946 by the whaling nations themselves as a self-regulating body to set quotas for whales to be caught. It came into force late in 1948 and established the International Whaling Commission ('IWC'). The Commission consists of one member appointed by each ratified party to the ICRW; which member might be accompanied by experts.¹²⁹ The IWC originally came into existence to provide for the proper conservation of whale stocks and thus to 'make possible the orderly development of the whaling industry'. The stated goal of the IWC is thus to protect all¹³⁰ species of whales from over-exploitation. This is not, however, a protectionist philosophy. The goal is the utilitarian one of gaining maximum benefit from the sustainable

1931 agreement proved to be inadequate to the task of managing whaling. It was extended by a 1937 agreement signed by nine whaling states. That agreement used management devices similar to its predecessor's. These were supplemented by a protocol signed in 1938 that banned the taking of humpback whales and created a whale sanctuary in the Pacific sector of Antarctic waters. Although significant portions of the major whaling fleets were sunk during the Second World War, the resumption of whaling was anticipated in a 1944 agreement promoted by the Whaling Committee of the [ICES]. An overall quota - a measure that had eluded earlier negotiators - was worked out at approximately two-thirds of the prewar catch. However, it was to be measured in a new unit, the notorious blue whale unit (BWU)'. *Ibid* 3 at 30-31.

¹²⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 123.

¹²⁵ *Ibid* at 125. '11 states - Argentina, Australia, Canada, Germany, Irish Free State, Japan, New Zealand, Portugal, South Africa, United Kingdom, and United States - were invited', Birnie records; but adds that '[n]ot all attended. Japan refused and Portugal, Canada and South Africa sent only observers. All the Antarctic whaling states, including Germany but excepting Japan, accepted the agreement which emerged from the Conference'. *Ibid* at 125. The Convention determined a closed season for factory ships in the Antarctic, set minimum size limits for whales taken, and prohibited the taking of calves of certain species. *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume I* (1978) at 29.

¹²⁶ *Ibid* at 126-127. Birnie adds that '[t]he previous agreement was ... extended by a Protocol which introduced some, but little, improvement. A new sanctuary area was provided by Article 2 in waters that were not in any event being fished; this measure did nothing, therefore, to reduce the Antarctic catch. ... The Protocol was ratified by Germany, Norway, the United Kingdom and the United States, but although Japan signed the Agreement and Protocol she did not ratify it'. *Ibid* at 126-127.

¹²⁷ *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume I* (1978) at 29. At this reconvening, the BWU was revised so that one blue whale came to equal two fin whales, two and a half humpbacks, or six sei whales. *Ibid*.

¹²⁸ *Ibid* at 132-133.

¹²⁹ IWC 'Report of the Plenary Session' (from 30 May 1949) at 23.

¹³⁰ Per the Annex of Nomenclature, of course. See (n 100).

usage of a natural resource. The countries opposed to whaling were eventually able to place a moratorium (technically, a 'zero quota') on whaling only because sufficient countries opposed to whaling joined and the countries in favour of whaling were outnumbered; not because this was originally envisaged as an option. In fact, the possibility of such a moratorium was probably not even thought of by the original signatories.

It has been suggested that '[a]lthough Norway, the United Kingdom, and Japan were the three leading whaling nations in the last season before the war, it was the United States that took the lead both in organizing the conference and in presenting proposals for the new convention';¹³¹ and that although no longer itself a major whaling nation, the US sought to be involved in the global whaling industry through its involvement with the United Nations framework, into which it sought to have the IWC drawn - 'specifically into the Food and Agriculture Organization (FAO)'.¹³² This last point is extremely ironic, as will be seen; given Japan's current efforts to have the FAO become involved - and America's resistance thereto.¹³³

3.1.3 *Inherent problems with the ICRW*

A recurring theme throughout this thesis will be that of historical irony: how often it is that states move to positions diametrically opposed to those they held earlier. Perhaps the 'missionary zeal' of the convert is partly to blame; perhaps, more cynically, the explanation is that states truly do act, at least largely, out of self-interest.

This point is not as trite as it might at first seem. In the morass of explanations which states give for their actions, it might be difficult sometimes to remember the extent to which self-interest underlies all.

Scarff suggests that the Convention has always had serious flaws: '[o]ne of the major problems of the Convention is that it strives to achieve several goals which have proven incompatible. ... The incompatibility of the Convention's goals is reflected in both the structure and history of the IWC'.¹³⁴ Birnie, however, writes that '[t]he problems that beset the IWC from its inception are ... similar to those confronting all international bodies attempting to manage migratory resources subject to open access'. The IWC, she argues, 'was the first commission to be established on a global scale and to some extent its difficulties must be related to the problems faced by any pioneer, to the lack of precedents and experience and to the constraints imposed by legal principles developed in a different age, before the

¹³¹ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 132-133.

¹³² *Ibid* at 132-133. 'The Conference', says Birnie, 'had two main items on its agenda: (a) the development of a code of regulations for the 1947-48 and subsequent seasons, based on codification of existing regulations, and (b) the establishment of a new institution, the International Whaling Commission, to promulgate future regulations. ... The US, in recent times the leading critic of the Whaling Convention, and pressing for a revision or replacement of it, was, in 1946, a main contributor to its terms, since the only draft concerning (b) above placed before the delegates was a Draft United States Whaling Convention which described itself as a Convention to provide for the orderly conservation of and development of whale fisheries. ... The Convention adopted by the Conference followed the US draft closely'. P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 166-167.

¹³³ See 14.1.3; also (n 152) and (n 153).

¹³⁴ J E Scarff 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (Part One)' (1977) 6 *Ecology Law Quarterly* 323 at 353-354.

development of twentieth century technology and advances in scientific knowledge'.¹³⁵ Jacobson argues that '[t]he main crystal-clear objective of the treaty was, and still is, to provide for the conservation of whales for the benefit of the whaling industry and its customers'.¹³⁶ 'The ICRW is', he continues, 'indeed, one of the primary early treaty commitments to the ideal expressed today as sustainable development of the earth's natural resources'. 'This ideal', he contends, 'heavily promoted by environmentalists in recent decades, has probably emerged by now as a principle of customary international environmental law'.¹³⁷

It is an interesting argument, that the ICRW in fact has come full circle and today reflects the views of environmentalists. To describe the 'ideal' of sustainable development as 'a principle of customary international environmental law' probably goes too far, however; in that sustainable development ought, in the present writer's view, to be seen as an 'overarching goal', rather than a principle.¹³⁸ Principles are more specific and help to attain goals. It would not, in any case, be a very practical principle. Jacobson is, therefore, arguably being disingenuous and conflating sustainable development with conservation (in its sense of 'wise use').

Jacobson goes on to ask rhetorically '[w]hat is the difference between the treatment of the ICRW and other international agreements for the conservation and management of the sea's renewable living resources? Start, of course, with the fact that, unlike fish, whales are mammals. This difference is, indeed, crucial. Mammals have much lower reproductive rates than fish, and overwhaling can therefore truly cause species extinction, while overfishing alone can probably never cause extinction'.¹³⁹ It is no doubt important to consider differences between the ICRW and other treaties regulating exploitation of the oceans' living resources. However, this seems a bizarre comment - extinction of fish species has been caused on a number of occasions, commercial extinction at least. This is simply another formulation of the idea - discussed later - that species of whales cannot become extinct because their hunters will stop hunting them when they become too scarce for hunting to be profitable.¹⁴⁰ Further, it is a problem that this suggestion by Jacobson seems to overlook interdependencies between cetacean and fish species.

3.1.4 The founding members and the purpose of the ICRW

Fifteen states attended the 1946 Washington Conference - Argentina, Australia, Brazil, Canada, Chile, Denmark, France, Netherlands, New Zealand, Norway, Peru, Union of South Africa, United Kingdom, the United States, and the USSR.¹⁴¹ Iceland, Ireland, Portugal and Sweden, attended as observers. Japan and Germany, still in disgrace after the Second World

¹³⁵ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 143.

¹³⁶ J L Jacobson 'Whales, the IWC, and the Rule of Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 81-83.

¹³⁷ *Ibid* at 81-83.

¹³⁸ However, see M Kidd *Environmental Law* (2008) at 15-17, where sustainable development is described as a principle.

¹³⁹ J L Jacobson 'Whales, the IWC, and the Rule of Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 81-83.

¹⁴⁰ See (n 1320), (n 1346) and (n 1499).

¹⁴¹ See <http://www.iwcoffice.org/commission/convention.htm#convsigs>.

War, were not present; and nor were any non-whaling states.¹⁴² Birnie suggests that '[t]he Conference's objectives were limited to the advancing of international cooperative effort in whale conservation; coordination and codification of existing regulations; and establishment of effective administrative machinery for the modification from time to time of these regulations, as conditions required'.¹⁴³

Birnie argues that it may actually be advantageous for the preservation of whales that the ICRW was not more specific in its original definitions; suggesting that the lack of a definition in the ICRW for the phrase 'optimum level' carries the inherent advantage that the terms remain 'open to interpretation; they can now, for example, be interpreted to apply more ecological principles and, therefore, ambiguity represents a more flexible approach than a specific reference to MSY (the most likely alternative in 1946) would have done.'¹⁴⁴ Her suggestion being made, of course, in the mid-1980s at a time when the validity of the preservation of whales was an idea that still needed to be fought for.

The original parties showed great reluctance to give up any more of their freedoms than absolutely necessary; something easily understandable in the immediate aftermath of the Second World War. According to M'Gonigle, 'each state could avoid being bound by Schedule amendments by "objecting" within ninety days. The United States had insisted on this provision in 1946, ever concerned not to sacrifice any national sovereignty'.¹⁴⁵ Ironies abound; with the US today being essentially opposed to states lodging reservations.¹⁴⁶ 'The true test of international legal arrangements', continues M'Gonigle, 'is enforcement; here too, with US assistance, the convention was weak'.¹⁴⁷

Numerous writers have suggested that the early attempts at regulation were not aimed at conservation. Victor writes that '[p]rior to the ICRW, whaling regimes practically ignored scientific assessment, failed to set rational quotas, and didn't enforce rules. ... [t]he ICRW, adopted in 1946, made only tiny improvements'.¹⁴⁸ Freeman writes that '[i]n those early post-World War II days, when the whaling industry was supplying a global market for oil, the IWC was in fact an oil cartel, concerned primarily with maintaining the world price of whale oil by

¹⁴² Birnie suggests that this was 'in spite of the US views on the undesirability of a commission limited to whaling states'. P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 165.

¹⁴³ *Ibid* at 165-166. According to Birnie, '[t]he immediate task was still regarded as administrative in character but the broad objectives of whale conservation were frequently referred to. In his opening address to the Conference, Dean Acheson, then US Acting Secretary of State, stated the interest in, and responsibility for development of, whale stocks as "a truly international resource in that they belong to no single nation nor to any group of nations but rather they are the wards of the entire world", adding that "whale conservation must be an international endeavour ... each nation, whatever its direct or indirect interest in whaling, will ultimately participate actively in the great tasks of fostering and developing this common resource." ...'. *Ibid* at 165-166. See (n 1803).

¹⁴⁴ *Ibid* at 169-170. See (n 151), (n 223), (n 408), (n 424), (n 813) and (n 873).

¹⁴⁵ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 135.

¹⁴⁶ The US originally opposed, at the 2001 and 2002 Meetings, Iceland's rejoining with a reservation on the 1982 moratorium on commercial whaling. At the intersessional meeting in October 2002, the US dropped their opposition to this - probably out of pure self-interest. See Annex C, generally.

¹⁴⁷ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 135.

¹⁴⁸ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 295.

regulating its supply'.¹⁴⁹ Komatsu and Misaki write that '[i]n those days, the IWC was a forum where whaling nations negotiated to set whale quota for their whale oil productions - a kind of "whalers' club" ...'.¹⁵⁰ This is a recurring theme from commentators - that the IWC was a 'cartel'.

3.1.5 *The early Meetings of the ICRW*

Per Birnie, many strengths of the ICRW were already apparent. 'It was, and remains', she writes, 'a great advance on previous regimes of regulation of whales and whaling, and on most existing fishery commissions'. The reasons she gives are that the ICRW provided for a continuing supervisory body; that regulations could be incorporated not in the Convention as such, but in a flexible amendable Schedule that continued to apply, whether amended or not; and that the IWC was able to make use of its Rules of Procedure 'to broaden and strengthen without the necessity of convening a Conference of plenipotentiaries'.¹⁵¹

By the second meeting (IWC 2), Oslo 1950, and the third (IWC 3) in 1951, in Cape Town, there were 21 states present as either Parties or observers; and by now there were 16 ratifications of the ICRW. New states to have ratified included Brazil, Mexico, Denmark, Japan and New Zealand. At this meeting it was decided that the IWC should remain outside of the ambit of any other international organisation. As this included the FAO, it occurs to the present writer that the decision was to have important consequences - a closer relationship with the FAO, which would have emphasised the food aspect of whaling, might well have made it more difficult eventually for preservation-minded states party to argue that the ICRW's main task is to consider whale preservation.¹⁵² Birnie suggests that this decision, was made largely for reasons of economy.¹⁵³

It appears that in 1952, three developing countries - Chile, Ecuador and Peru - signed the 'Declaration of Santiago', in terms of which they claimed exclusive rights for themselves over a maritime zone 200 miles off their respective coasts. At the same time, the three adopted a 'Joint Declaration on Fishery Problems in the South Pacific' and agreed to establish the 'Permanent Commission of the Conference on the Use and Conservation of the Maritime Resources of the South Pacific (PCSP)'. 'However understandable', comments Birnie, 'because of the depredations by foreign fleets of the fishing grounds of these countries and the Truman Proclamation of [the US] claiming exclusive rights to the seabed resources of the continental shelf, the actions of these developing states threatened the IWC's effectiveness and greatly undermined the implementation of its regulations until 1979, when Chile and Peru finally joined the IWC. ... The PCSP argued that the IWC regime favored wealthy countries

¹⁴⁹ M M R Freeman 'Is Money the Root of the Problem? Cultural Conflicts in the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 123 at 139.

¹⁵⁰ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 19. See (n 160), (n 168) and (n 177).

¹⁵¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 210-202. See (n 144), (n 223), (n 408), (n 424), (n 813) and (n 873).

¹⁵² See 14.1.3; also (n 133).

¹⁵³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 212-213.

and damaged poor countries'.¹⁵⁴ It is ironic that today the same argument is made, but the former PCSP members are now on the side of their erstwhile 'rich' opponents - and opposed to 'poor countries' which base their pro-whaling arguments on 'food security' and 'cultural imperialism' issues.¹⁵⁵

As the early annual meetings got under way, new states gradually began to attend - usually initially as observers (Panama, Italy and Portugal, for example). It became apparent also that whale stocks were continuing to decline; in other words, the preservation element - certainly there in theory - was not there in practice.¹⁵⁶ Much dispute centred on the thorny issue of Antarctic whaling. IWC 10, 1958, saw a proposal introduced that - since the IWC did not provide for setting national quotas - those Parties involved in Antarctic whaling should set their own quotas outside the auspices of the IWC.¹⁵⁷

3.1.6 *Withdrawals - difficult days*

In 1959 the IWC saw three Parties - the Netherlands, Norway and Japan - threaten to withdraw. The issue was the failure of Antarctic whaling states to agree on catch allocations. The Netherlands and Norway did then allow their withdrawals to take effect - their withdrawals taking effect during the meeting.¹⁵⁸ Japan, however, chose to withdraw its notice - stating that it 'fully recognised the exemplary and rational nature of the present Convention as a means of preserving collective operations'.¹⁵⁹ This is interesting - Japan has on several occasions over the years threatened to withdraw - most recently at IWC 59 in Anchorage in 2007, as will be seen later.¹⁶⁰ However, it never has done so - despite its supposed isolationist stance, and despite being treated on occasion as something of a global pariah because of the whaling issue. It is a positive sign that Japan has chosen to remain within the international community, as much as possible; on the other hand, Japan has - as will become apparent - been at times both subversive and hypocritical.

It is strange to speculate that if Japan had been less hardline in the late 1950s, there might perhaps never have been a moratorium - and today we might be living with, and even be fairly accustomed to, whaling. After all, it was the excesses of whaling - not whaling itself - that led to a moratorium that was not easily won. Per Birnie, IWC 11 'proved to be the most critical in the IWC's history to date' with the 'short-sightedness' of Norway, the Netherlands and Japan now being 'difficult to credit'. It seems that these countries, particularly Japan and the

¹⁵⁴ P Birnie 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937 at 941-42.

¹⁵⁵ See 16, generally.

¹⁵⁶ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 216.

¹⁵⁷ *Ibid* at 242.

¹⁵⁸ *Ibid* at 250. According to Birnie, '[IWC 11, London, 1959,] was a crucial meeting, attended by [15] member governments. The IWC was now faced with the threat of withdrawal by three Antarctic whaling states ..., whose inclusion was vital to its success. ... The Commission was conciliatory towards its withdrawing members. Its immediate objective became to keep them within the membership rather than to conserve stocks, ... On the last day of the meeting, the Commission was informed that the Antarctic pelagic whaling countries had again failed to reach an agreement on national quotas and the Netherlands and Norway announced their withdrawal as from 1 July, 1959. This had disastrous consequences for conservation. The withdrawal date ... fell in the middle of [IWC 11] and the pressure thus exerted forced members to seek any means, however unscientific and antipathetic to conservation, of keeping the IWC membership intact'. *Ibid* at 250.

¹⁵⁹ *Ibid*.

¹⁶⁰ See 3.3.25 - 3.3.34; esp. at 3.3.31.

Netherlands, insisted on disregarding the SC's majority view on declining stocks, insisting that economic objectives must override scientific advice. The Netherlands and Norway even withdrew, apparently so that no effective quota would be binding on them.¹⁶¹

Today, of course, it is Japan - with other pro-whaling states, such as Iceland and Norway - that argues most fervently that decisions must be made 'based on science' and that regard must be had to the views of the Scientific Committee.

The next meeting, IWC 12, 1960, has been described as 'difficult' - given the absence of Norway and the Netherlands.¹⁶² Clearly, without two of its most important members, the IWC could not function properly - showing how fragile an international convention can be, particularly in its early years. This fragility is something that should not be forgotten even today, however; as the ICRW might be an example of a convention that never has truly 'worked'. The Meeting, according to Birnie, exposed other flaws in the ICRW also; which 'states could and did exploit in pursuit of short-term national interest' although the flaws she identifies¹⁶³ are no longer major issues and so will not be discussed.

An interesting perspective on the original application and effectiveness of the Treaty can be found in the writing of RB Robertson in a work published in 1954. *Of Whales and Men* is an account of eight months the writer spent aboard a British whaling ship in the South Atlantic. Robertson suggests that inspectors employed by the IWC faced problems of double loyalty: to whichever government employed them, and to the Convention itself.¹⁶⁴ He describes such inspectors as having 'a hundred or more regulations and restrictions to enforce' and having to be 'seam[e]n, zoologists, mathematicians, men of absolute integrity who can refuse bribes presented daily in sundry attractive forms ... detectives with the observation and acumen of Holmes ... lawyers, arbitrators, and often judges ... in order to impose the international law and prevent the 'title to the ocean belonging to any people or private persons', while at the same time remaining 'on terms of good will with avaricious whale owners and with hundreds of whalers, every one of whom is trying to hoodwink them'.¹⁶⁵ The gentle irony in this captures well the attitudes of the time toward restrictions on whaling.

3.1.7 *The purpose of the ICRW*

'The common interest', of the parties to the ICRW, according to Vogler, was to achieve 'the optimum level of whale stocks', confining whaling to those species 'best able to sustain exploitation' (per the ICRW Preamble). He explains the problem, though, to have been that

¹⁶¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 253-254.

¹⁶² *Ibid* at 254.

¹⁶³ *Ibid* at 260. Birnie writes that '[IWC 12] was one of the most critical ... The ICRW prov[ing] at this stage to have three particularly serious deficiencies: first the lack of provision for international inspection, which enabled some states continually to disregard quotas, ...; secondly the prohibition in Article V(2)(c) on limitation of number or nationality of factory ships and land stations ...; thirdly the provision for withdrawal, so regrettably implemented during this decade'. *Ibid* at 260. Of these three 'weaknesses', one has returned in a slightly different form - with the provision of, and payment for, international inspectors being one of the obstacles (in the late 1990s and early 21st Century) to adoption of the Revised Management Scheme. See 8.1; esp. at 8.1.2 and 8.1.3. The second 'weakness' is no longer an issue; and the third has returned as another obstacle in the 21st Century. See [Annex C](#).

¹⁶⁴ R B Robertson *Of Whales and Men* (2nd ed, 1969 (1954)) at 195.

¹⁶⁵ *Ibid* at 195-196.

the term ‘optimum’ was not defined and ‘was certainly not interpreted in terms of the maximum sustainable yield concept developed for other fishery resources’. Neither, he says, was there any sense that whales should be recognized as a highly mobile ‘common heritage’ resource in which everyone had a legitimate interest; and ‘the regime may have urged conservation but it was still very much an arrangement between those with an interest in commercial exploitation’.¹⁶⁶ Lyster agrees partially, writing that ‘the Convention is by no means a protectionist treaty’; explaining that the phrase ‘and thus make possible the orderly development of the whaling industry’ makes it clear that the main object of the Convention is conservation of whale stocks for the secondary object of enabling the whaling industry to ‘develop in an orderly fashion’. Conservation is ‘the top priority; development of the whaling industry comes next’.¹⁶⁷

Whatever the true original emphasis of the treaty may have been, what is not in doubt is that in its very early years its parties acted as though the former interpretation were the correct one. This does not mean, though, that this makes it the true interpretation, although it can of course be a good indication; it is possible that parties acted in their own interest in ways that they knew were contrary to the import of the treaty, relying on the ambiguity that necessarily surrounded the early interpretation of so contentious a treaty.

Using similar terms (although writing from an opposed ideological stance) to Komatsu and Misaki earlier,¹⁶⁸ Day suggests that ‘[t]he International Whaling Commission (IWC) was a ‘whalers’ club’.¹⁶⁹ According to Day, under direction of the IWC a greater number of whales was killed than had ever before been the case. He ascribes this to there being no proper monitoring system to detect infractions, untrustworthy observers, a lack of punishment for transgressors, and the fact that IWC members often violated their own set quotas, if it did not suit them, by simply filing an ‘objection’ and continuing the kill.¹⁷⁰ M’Gonigle agrees with this, arguing that the establishment of seasonal time limits ‘encouraged each nation to develop the most efficient vessels and killing techniques possible to maximize its share of the Antarctic quota’. The result was what whalers called ‘the Whaling Olympics’; and what M’Gonigle describes as ‘a classic demonstration’ of ‘the tragedy of the commons’.¹⁷¹

IWC 13, 1961, saw the Netherlands still absent; while Norway had rejoined in 1960, but gave notice of its intention to withdraw again at the end of 1961. By IWC 14, 1962, however, there were 18 members and the Netherlands had rejoined. Nothing really had changed, however. Whale populations, all available evidence showed, were continuing to decline; the Scientific Committee continued to advise reductions in quotas; and members continued to ignore recommendations for reductions.¹⁷²

¹⁶⁶ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 50.

¹⁶⁷ S Lyster *International Wildlife Law* (1985) at 20.

¹⁶⁸ See (n 150), (n 160) and (n 177).

¹⁶⁹ D Day *The Whale War* (2nd ed, 1992) at 41-43.

¹⁷⁰ *Ibid* at 41-43.

¹⁷¹ R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 137. See [11.2](#).

¹⁷² P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 303.

Given what we know of IWC member positions in the 21st Century, it is sometimes quite bizarre to read accounts of the early years of the Convention. Scarff writes, for instance, that '[f]rom 1952 to 1962 the major opponent to the passage of conservation measures was neither Japan nor Russia, but the Netherlands. The Netherlands had not been a major whaling country for hundreds of years, but its delegate to the IWC during this ten year period adamantly relied on an unjustifiable biological analysis that resulted in higher population estimates than those made by the other members of the Scientific Committee'.¹⁷³ Today, the Netherlands is one of the most protectionist Parties.

3.1.8 *The last chance spurned*

Birnie describes IWC 15, 1963, as having 'presented the last chance' to halt the slide of whale populations; at least to restore them to 'something approaching the level at which they had been at the time of the IWC's institution'. The opportunity, almost needless to say, was not taken.¹⁷⁴ Japan's delegates, it seems, supported by those of the USSR, took the line that it was not for non-pelagic whaling countries, for whose economies the whaling industry was not important, to dictate to Japan - already, Japan was beginning to argue that the problem could not be discussed 'only in terms of conservation of whale stocks'.¹⁷⁵ At the time, the word 'conservation' was clearly understood to mean 'preservation' - and not to be a goal of the whaling members. As will be seen, the debate has since then become more complicated.

M'Gonigle suggests that the face of pelagic whaling was beginning to change, however; recording that in the years 1963 and 1964 the United Kingdom and the Netherlands sold their fleets and quotas to Japan and themselves withdrew from the industry. Japan was left with 'fifty-two percent and the Soviet Union with twenty percent of the IWC quota'.¹⁷⁶

As with the earlier creation of the IWC, it has been argued, by Komatsu and Misaki, that later policies of the IWC, such as the setting of quota units, were put in place because the main function of the IWC remained the control of whale oil prices, using the BWU, and was not species conservation.¹⁷⁷

The result, suggests Vogler, of this was an 'open access commons tragedy'¹⁷⁸ on a daunting scale in which 'an over-capitalized whaling industry took its short-term profits and then, in the main, disappeared along with most of its quarry. An even earlier collapse was only averted by

¹⁷³ J E Scarff 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)' (1977) 6 *Ecology Law Quarterly* 323 at 361.

¹⁷⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 324.

¹⁷⁵ *Ibid* at 329. Birnie records that '[no quota had been fixed for the Antarctic for 1964-65, and so] a unique meeting attended by [13 members - Argentina, Australia, Canada, Denmark, Norway, France, Japan, Netherlands, New Zealand, Norway, South Africa, UK, USA, USSR, and ten observers, inc Chile and Portugal] ... was held for the sole purpose of fixing the Antarctic quota. [The Netherlands did not operate in the season.] ... [The parties agreed to] a revised US compromise of 4 500 BWU for one year coupled with a commitment to further reductions, ... The Resolution, however, was not *per se* binding and in fact only required members of the Commission to *recommend* this course of conduct to their Governments'. *Ibid* at 334-335.

¹⁷⁶ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 139.

¹⁷⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 81. See (n 150), (n 160) and (n 168).

¹⁷⁸ See 11.2; and (171).

the First and Second World Wars, which gave rise to an incidental cessation of whaling during which stocks were able to recover somewhat'.¹⁷⁹ Whale stocks recovered during the Second World War then, as did fish stocks generally. The recovery, however, was to be short-lived.

When protective measures were taken, these were always too weak and taken too late - reminiscent, of course, of protective domestic wildlife-related legislation worldwide.¹⁸⁰ According to Martin, '[i]n 1963, the IWC officially banned the hunting of humpback whales in the Southern Ocean. The IWC had in the case of the humpback whale failed to live up to its stated aim of whale conservation. The 1963 prohibition on whaling humpbacks was a response to the simple fact of stock exhaustion'.¹⁸¹

Subsequent Meetings, in the late 1960s, saw familiar trends continue. Scientific evidence continued to show that whale populations were declining; agitation increased for stricter quotas, whilst existing quotas tended not to be filled; whaling members continued to argue for increased quotas; and hunting efforts moved toward less-exploited species. The Commission continued to use the increasingly discredited Blue Whale Unit.¹⁸² New Zealand, increasingly supporting a preservationist approach, in 1968 announced its withdrawal again; in 1969 so did the Netherlands. There was, according to Birnie, general dissatisfaction with the IWC.¹⁸³

Another familiar trend, of course, was hypocrisy and self-interest. M'Gonigle writes that 'at the very time the United States was leading the proposal for a stepped reduction in the quota for the Antarctic, a California-based whaling company was completing the annihilation of a population of humpback whales that had flourished off the coast of Monterey for millenia'.¹⁸⁴ The Antarctic, he continues, 'was largely exhausted by 1965'; with the blue whale having 'already disappeared' when it was given 'protected status' that year, and the fin whale population being 'vastly depleted, leaving the sei and later the smaller minke whale and the sperm whale'.¹⁸⁵

This devastation had, of course, been predicted. In *Moby Dick*, Herman Melville wrote that '[w]hether owing to the almost omniscient look-outs at the mast-heads of the whaleships, now penetrating even through Behring's straits, and into the remotest secret drawers and lockers of the world; and the thousand harpoons and lances darted along all continental coasts; the moot point is, whether Leviathan can long endure so wide a chase, and so remorseless a havoc;

¹⁷⁹ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 49. Vogler then records that '[c]ountries such as Britain and the United States effectively gave up commercial whaling (the last British ship was sold to Japan in 1963) but remained within the Convention, where they were joined by a number of new members'. *Ibid* at 50.

¹⁸⁰ Consider, as just one example, the measures taken in the Cape Colony, South Africa, in the late 1800s, to protect the quagga. By the time the quagga was given legislative protection (through the Act for the Better Preservation of Game, 1886), the last known specimen - which had been in the Artis Magistra zoo in Amsterdam - had died (on 12 August 1883). See, for instance, J A Pringle *The Conservationists and the Killers: The Story of game Protection and the Wildlife Society of Southern Africa* (1982) at 63; and <http://www.southafrica.info/about/animals/quagga.htm>.

¹⁸¹ S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 91.

¹⁸² See (n 121) and (n 192).

¹⁸³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 338-339.

¹⁸⁴ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 140.

¹⁸⁵ *Ibid* at 140.

whether he must not at last be exterminated from the waters, and the last whale, like the last man, smoke his last pipe, and then himself evaporate in the final puff'.¹⁸⁶

3.2 A sea change in attitude

3.2.1 *The rest of the world becomes involved*

The first two Meetings of the 1970s, London in 1970 and Washington DC in 1971, saw little improvement; with whaling members seeking relaxations of existing restrictions, and the Blue Whale Unit still entrenched as the primary management tool - although Birnie does argue that the 1971 Meeting was significant because of attention beginning to turn toward the stocks of smaller cetaceans (minke whales, for example), an example of the tendency to seek smaller targets as the larger species became reduced in number. It was significant also as some states began to argue that *all* cetaceans should be brought under the regulation of the IWC - a call that is still being made today, in the 21st Century.¹⁸⁷

Shortly before IWC 24, London 1972, the United Nations Conference on the Human Environment (UNCHE) met in Stockholm - at that time the largest ever gathering of Heads of State and the first ever truly global consideration of environmental issues. The Conference produced the Stockholm Declaration, an important set of guiding Principles;¹⁸⁸ and led directly to the formation of the United Nations Environmental Programme (UNEP).¹⁸⁹ It produced also a Resolution on whaling (recommending a 10-year moratorium on commercial whaling); which was forwarded to the IWC, presented by Maurice Strong, the Conference Secretary-General.¹⁹⁰

IWC 24 saw, for the first time, full attendance - reflective, per Birnie, of 'the growing international interest'.¹⁹¹ The Blue Whale Unit¹⁹² was abandoned - at least in respect of Antarctic catches; but the IWC's Scientific Committee considered, per Birnie, that 'a blanket moratorium could not be justified scientifically, since '[a] blanket moratorium is in the same

¹⁸⁶ H Melville *Moby Dick* (1994 (first published 1851)) at 436.

¹⁸⁷ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 409-412.

¹⁸⁸ See, for instance, United Nations Environment Programme *Selected Texts of Legal Instruments In International Environmental Law* (2005) at 79-82.

¹⁸⁹ See, generally, www.unep.org; and D Kaniaru 'The Stockholm Conference and the Birth of the United Nations Environment Programme' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (University of Joensuu-UNEP Course Series 2) Joensuu: University of Joensuu, 2006 3.

¹⁹⁰ According to Birnie, '[t]he [UNCHE] met in June 1972 without the USSR and other Eastern Bloc states, which had, however, taken part in the preparation for it. Its Committee Two on "The Environmental Aspects of Natural Resources Management" considered the state of the whale stocks and recommended a ten year moratorium on commercial whaling to permit the whales' recovery. The UNCHE Report records that Japan opposed this in Committee, saying that their scientists had advised [53] three in favour and none against, but there were [12] abstentions. Japan abstained stating this time that 'while it was favourable to a moratorium on commercial whaling, it had abstained in the vote because the whole question was to be considered by the [IWC] on the basis of available scientific information'. P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 364-365.

¹⁹¹ *Ibid* at 420-421.

¹⁹² See (n 121) and (n 182).

category as a blue whale unit quota, in that they are both attempts to regulate several stocks as one group whereas prudent management requires regulation of the stocks individually'.¹⁹³

For the first time also, the United States found itself caught in a contradictory position in respect of aboriginal subsistence whaling. The country had been one of the main drivers behind the UNCHE, and had begun to provide whales with significant protection under its domestic legislation; but at the IWC 24 found itself facing calls for more stringent accounting for whales taken by its aboriginal populations. According to Birnie, '[t]he small take by aborigines ... began to assume increasing importance as stocks declined'; and the US was 'asked to reduce the waste in its aboriginal whaling arising from the fact that so many whales were struck but not killed and were subsequently lost'. Birnie describes this as having been a direct challenge to the 'conservationist stance' of the US; and one which put it into an embarrassing position in regard to its Inuit Eskimo population. Writing in 1985, Birnie suggests that the issue 'has caused problems to both the [US] and to the IWC to the present day, causing the [US] on some occasions to modify its objections to higher quotas for pelagic whaling in order to attract pelagic whaling states' votes for higher quotas also for the Inuits'.¹⁹⁴ These are prescient words, considering the dominance of the issue at the 2002 and 2007 Meetings.¹⁹⁵

M'Gonigle argues that, at the Stockholm Conference, it was in response to a US proposal that states unanimously adopted Resolution No. 33; which read:

[i]t is recommended that Governments agree to strengthen the [IWC], to increase international research efforts, and as a matter of urgency to call for an international agreement under the auspices of the [IWC] and involving all governments concerned, for a 10-year moratorium on commercial whaling.¹⁹⁶

Birnie considers there to have been two significant events in the early 1970s which had an impact on whaling then, and since then. One was the 1972 UNCHE, which was to have an important influence on the IWC.¹⁹⁷ The other was the change in domestic policy in the United States. In 1969, the US amended its Endangered Species Preservation Act of 1966 (ESPA), which originally enabled it to create a list of national wildlife and fish threatened with extinction. The 1969 amendments allowed for increased listing of species, to include those threatened with worldwide extinction - and including even species located within foreign jurisdictions or on the high seas - and largely prohibited importation of such species into the US. In 1972 the US adopted a more comprehensive Marine Mammal Protection Act (MMPA); which introduced a moratorium on the taking in the US of all marine mammals and products, and prohibited their importation. In 1976, the US, through Congress, extended its fisheries jurisdiction to 200 nautical miles; giving greater strength and effectiveness to the Act.¹⁹⁸

¹⁹³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 422.

¹⁹⁴ *Ibid* at 425-426.

¹⁹⁵ On 2002, see 3.3.9, 3.3.10, 3.3.25, 10.2.2 and 10.2.3; on 2007, see 3.3.25 and 3.3.34.

¹⁹⁶ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 141.

¹⁹⁷ P Birnie 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937 at 946-47.

¹⁹⁸ *Ibid* at 947-48. Writing in 1985, Birnie tells us that '[a]fter the Stockholm Conference in 1973 [*sic*], and following the initiatives of the [IUCN], the United States also strongly advocated the adoption of the [CITES]'. *Ibid* at 947-48. Again, this is interesting for how it shows States shifting their positions. Today, the US is one of the countries *not* in favour of linking CITES and the IWC.

Further, the US in 1973 strengthened its Endangered Species Preservation Act by recognizing the ‘aesthetic, ecological, educational, historical, recreational and scientific value’ of endangered species of wildlife; by providing for the conservation of these; and by ‘urging all United States federal agencies to help achieve these objectives by taking all measures necessary to remove species from the endangered category’. Effective sanctions were provided for, in respect of the international aspects of the above legislation, by Congressional amendment of two major national Acts dealing with fisheries. In 1978, Congress adopted the Pelly Amendment to the 1967 Fishermen’s Protective Act;¹⁹⁹ and in 1979, continuing, in Birnie’s words, to take ‘conservation-minded measures’, passed the Packwood-Magnuson Amendment to the [1976] Magnuson Fishery Conservation and Management Act (FCMA).²⁰⁰ Significantly for events to come within the decade, the amendments encouraged nonmember states to join the IWC.²⁰¹ The strategic introduction as ICRW members of states not actively engaged in whaling was to become an important feature of the history of regulation of whaling.

Birnie has argued that the United States’ domestic ‘sanctions are most likely to be used against developing states because the US has more economic and political leverage with such countries than with, for example, the USSR or Japan’;²⁰² and this seems to be borne out in practice. Further, the US immediately introduced to the IWC, as required by its national Acts, this new perspective on international management of endangered species. Supported, she suggests, ‘by sympathetic noncommercial whaling states’, the US began to urge the IWC to switch to ‘conservation rather than exploitation’ as its main objective. The US, she continues, ‘also proposed ecological principles of management and preservation of species habitats’. This has to be recognised as a supreme irony in the light of present policies. The irony deepens as Birnie continues, explaining that the US ‘urged the Commission to adopt a perspective on environmental factors affecting population estimates much broader than the IWC or its Scientific Committee ever before considered’. Over the next decade, she suggests, several other states, following the lead of the US, began to raise at the IWC the issue of ‘interrelationship and interdependence of whales with other species and their food chains, and to take into account when estimating stock yields the impact of pollution and the effects of current and temperature changes’.²⁰³

There are a number of ironies here, as will become apparent later. Today, in the 21st Century, it is the pro-whaling countries which are ‘proposing ecological principles’ and ‘asking the IWC to consider the interrelationship and interdependence of whales with other species and their food chains’ - in fact, this has become one of the major arguments of those countries wishing to resume commercial whaling.²⁰⁴

¹⁹⁹ *Ibid* at 948. See 8.4.

²⁰⁰ *Ibid* at 948-49. See 8.4.

²⁰¹ *Ibid* at 948-49. See 16, generally.

²⁰² *Ibid* at 949. Birnie explains that ‘[t]he sanctions proved particularly effective against Latin American countries which are particularly dependent on fishing opportunities and markets in the United States. For example, the mere threat of certification was enough to persuade both Chile and Peru finally to join the IWC in 1979’. *Ibid* at 949.

²⁰³ *Ibid* at 949-50.

²⁰⁴ See 6.1.7 and 6.1.8.

Globally, *mores* were beginning to change, however; and the early 1970s reflected the new environmental understanding and concern which had begun in Western countries in the 1960s. Countries began to recognise the whale as a symbol of environmental concern. Komatsu and Misaki tell us that at the UNCHE in 1972, the Secretary-General of the Conference ‘delivered a strong speech’ asserting that ‘all whales’ were endangered. At this Conference, they explain, the US ‘engineered tactful lobbying to establish a 10-year moratorium for commercial whaling’. This resolution, they argue, ‘was adopted by the Stockholm Conference and carried over to a decision by the IWC. But the members of the IWC Scientific Committee did not recognize the need of a blanket moratorium on all stocks of whales. The Committee remained adamant that while some whale stocks were endangered, other stocks remained healthy. As such, the resolution was not implemented by the IWC’.²⁰⁵

The suggestion here is that the United States had engaged in ‘tactful lobbying’ - and is therefore an allegation of early political engineering by the US. Later, the allegations of such engineering would not be described as ‘tactful’; but rather as blatant.²⁰⁶

The call from the Stockholm Conference did not immediately appear to have made very much impression on the IWC. Day explains that the IWC response to ‘[t]he unanimous 52-0 nation vote for an immediate moratorium on all commercial whaling at the [UNCHE] in Stockholm’ was to ‘listen politely to the plea of the conservationist spokesmen’; but then for only four of the 14 nations to support the UN moratorium in a vote: Argentina, Mexico, the UK, and the US. Six nations voted against the moratorium: Iceland, Japan, Norway, Panama, Russia, and South Africa. Australia, Canada, Denmark and France abstained.²⁰⁷ Scarff comments that ‘[t]he Commission had been directly rebuked by the world community’.²⁰⁸ Of course, one might turn this around and suggest that it was the Commission that had ‘rebuked’ the world community!

The next year, however, was different. In Day’s words, ‘when the crunch came and the moratorium vote was called for at the 1973 IWC, it was a very different story from the year before. This time it was the whalers who were reeling from the impact’. Eight states voted ‘yes’; five ‘no’; and one abstained. The four states which in 1972 had voted in favour of the moratorium were joined by Australia, Canada and France; and, in Day’s words, ‘amazingly Panama deserted the whalers’ ranks and also voted yes’. Denmark was the only state which abstained.²⁰⁹ The position on whale take quotas did not change quickly, however; despite the significance of the vote.²¹⁰

²⁰⁵ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 85.

²⁰⁶ See 16; esp. 16.1.4.

²⁰⁷ D Day *The Whale War* (2nd ed, 1992) at 43-49.

²⁰⁸ J E Scarff ‘The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)’ (1977) 6 *Ecology Law Quarterly* 323 at 367.

²⁰⁹ D Day *The Whale War* (2nd ed, 1992) at 43-49.

²¹⁰ ‘The IWC’, per Day, ‘had not been a whalers’ club since 1948 for nothing. Any restrictive ruling in the IWC required not just a simple majority, but a three-quarters majority vote. ... However, the whalers’ club was shaken to its foundations. For ever after, the whalers were doomed to be a minority voice within their own convention’. ‘However’, adds Day, ‘by 1974 the possibility of victory by surprise attack had been lost, and both sides were deeply entrenched. Furthermore, Japan had rigged the voting by recruiting Brazil as an IWC nation. For some time Brazil had been the base of a Japanese-owned and -managed whaling station that worked illegally outside the rules and quotas of the IWC. ... the 1974 ... NMP ... Japanese and Russian strategists managed to find legal loopholes as a means of exceeding quotas by many thousands of whales

IWC 25, London 1973, saw the Scientific Committee continue to argue, in Birnie's words, that there was no 'biological requirement for a blanket moratorium' on all commercial whaling. A moratorium, it was said, would be contrary to the objective of the ICRW; these being, per the Preamble, 'to safeguard for future generations the great natural resources represented by the whale stocks' by a 'system of international regulation for the whale fisheries to ensure proper and effective conservation of whale stocks' - which implied that the resources 'should be so managed as to keep them in a condition which will enable them to provide the optimum yield on a continuing basis'.²¹¹

This is not dissimilar to the Scientific Committee's arguments today, in the 21st Century - in fact, the Scientific Committee has remained relatively stable in its views through the decades (it is the reactions of the parties to its advice that have varied). However, the Scientific Committee voiced certain concerns; and the Meeting was not a great success in conservationist eyes.²¹² Something of interest for future developments which arises from the same meeting is that the parties (state members and non-governmental) who argued in favour of a moratorium did so largely on the basis of the 'need for an ecosystem approach'.²¹³

According to the *Chairman's Report* for the 25th Meeting, a Proposal was considered for a world-wide moratorium on commercial whaling. The Proposal was considered by the Scientific Committee and the Technical Committee; at the former, the Committee considered that at the present time there was no biological requirement for the imposition of a blanket moratorium on all commercial whaling and the majority considered that there was at present no biological justification for such a moratorium. At the latter, a resolution was considered, proposed by the US and seconded by Argentina and France. This resolution 'referred to the concern that all the species of great whales were at present depleted considerably below their original population levels, due not only to excessive exploitation but also because knowledge was inadequate to protect the species, and, in order to provide time that the nations could use to enhance their knowledge of the ecology and population dynamics of whales and permit the most rapid recovery of whale populations'. The resolution 'proposed that the Commission decide that commercial whaling for all species of cetaceans should cease for a period of ten years beginning not later than three years from the date of the adoption of the resolution, except aboriginal catches where they do not endanger the species'. The resolution was approved by the Committee by majority vote. In the plenary session, however, the Soviet Commissioner repeated that the USSR was opposed to the resolution 'on the grounds that it was contrary to the findings of the Scientific Committee, that it was incompatible with the

without appearing to directly challenge the IWC's authority. By intentionally 'misunderstanding' rulings, issuing unilateral 'scientific permits' and hunting unclassified species such as orcas, the whalers managed to supplement their quotas by several thousand whales.' *Ibid* at 110. The suggestion that Japan had originally recruited Brazil is another of the wonderful ironies in the history of the IWC - given Brazil's current prominent role as an anti-whaling country. It provides also an early - perhaps even the first - example of Japanese efforts to manipulate ICRW membership in its favour. See 16, generally; esp. at 16.1.1. See also (n 846).

²¹¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 434.

²¹² *Ibid* at 436.

²¹³ *Ibid* at 442-443. Per Birnie, '[t]he IUCN observer, for example, drew attention to the lack of scientific evidence on ecosystem effects; [and] the US pointed out the "gross uncertainties and maze of complexities we are just beginning to understand about the marine ecosystem" ...'. *Ibid* at 442-443.

Convention and its schedule and would lead to the cessation of the Convention and to unregulated whaling’.²¹⁴

According to the Japanese Commissioner, the proposed moratorium was ‘not only without scientific foundation, but [was] in contradiction to the spirit ... of the convention, which stipulates that the amendments to the schedule of the convention shall take into consideration the interests of the consumer of whale products and the whale industry’.²¹⁵ According to the *Chairman’s Report*, further, ‘[i]n moving the adoption of the resolution, the United States Commissioner said that his delegation would not have proposed the moratorium if it felt it were in contravention of the Convention and it had reservations in respect of the recommendations of the Scientific Committee’. Argentina and France seconded the motion; which failed with eight votes in favour, five against and one abstention.²¹⁶

In language rather prescient of debates to come, Mr Norby, the Norwegian Commissioner at IWC 25, said that ‘[t]o try to press this matter [the moratorium] through by a majority vote strikes me as being a somewhat unusual way in which to pursue international cooperation’.²¹⁷ Norby then suggested that the consequences of the passing of a moratorium through majority vote might well be the ‘total collapse of the Commission as such’; and that ‘countries with no whaling interests at stake should have this in mind - thinking of the future of the Commission - when casting their votes’.²¹⁸

South Africa’s stance at IWC 25 was interesting - and revealing. According to Birnie, South Africa argued that it had voted against the Stockholm Conference moratorium resolution because it considered whales ‘to be similar to other marine resources that are currently exploited for human needs, representing an excellent source of protein and fats if managed sensibly on a sustained yield basis’. South Africa apparently pointed out that ‘the [US] view, that because scientific evidence was inadequate there should be a ban on exploitation[,] would render it unjustifiable to exploit many, if not most, marine resources’. South Africa explained that it was its opinion that ‘one must use the best scientific evidence available and if in doubt adopt a conservatory management policy since both the human population’s protein needs and humans’ impact on the environment forced mankind to manage natural resources in an increasingly sophisticated manner’.²¹⁹

²¹⁴ ‘Chairman’s Report’ International Whaling Commission *Twenty-Fifth Report of the Commission 1973-74* (1975) at 26. [Report: R Stacey; Secretary to the Commission.]

²¹⁵ Mr I Fujita, Japan, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* at 27.

²¹⁶ ‘Chairman’s Report’ International Whaling Commission *Twenty-Fifth Report of the Commission 1973-74* (1975) at 26. [Report: R Stacey; Secretary to the Commission.]

²¹⁷ Mr Norby, Norway, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* Day Two, at 5. Norby added: ‘I would think that normally international cooperation is based upon the concept that the highest possible degree of agreement should be achieved. It is the experience of this delegation that very seldom can positive results be achieved when matters are decided by a majority vote and when the countries whose interests are at stake, are faced with a decision contrary to their interests’. *Ibid.*

²¹⁸ *Ibid* at 5.

²¹⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 444-445. As evidence that effective management was possible, South Africa apparently pointed to the spectacular recovery of the Californian gray whale and its recent removal from the IUCN Red Data list; to the signs of recovery of blue and humpback whales after thirteen years of total protection; and to the SC’s proposal for a new and refined basis for quotas. *Ibid* at 444-445.

This, ironically, is both diametrically opposed to South Africa's current (21st Century) stance on whaling; and yet almost perfectly representative of the sustainable use philosophy which South Africa simultaneously favours in respect of almost all other natural resources.

The actual words of South Africa's Commissioner in 1973, Mr de Jager, were as follows:

[s]everal people have queried our position on [the moratorium resolution], indicating that South Africa has an excellent conservation record with terrestrial mammals. ... We consider whales to be similar to other marine resources that are currently exploited for human needs, representing an excellent source of protein and fats if managed sensibly on a sustainable yield basis. ... The crucial point seems to be that one must use the best scientific evidence available, and if one has serious doubts about that evidence, to adopt a conservative management policy. ... we feel that the increasing human population, its protein needs, its encroachment on and pollution of the environment, will force us, willingly or unwillingly, to manage our natural resources in an ever increasingly sophisticated manner in the future. ... It is our contention that a moratorium on the exploitation of all commercial whale species at this time is not a rational management policy, considering the different states that each species and most stocks are in.²²⁰

The word 'conservation' as used here clearly meant something other than 'taking' and closer to preservation, at least in the context of whaling - although to the South African government, it would have a more nuanced meaning in the sustainable use sense. Interestingly, of course, the sense of the submission is not far off South Africa's current stance on all wildlife.

de Jager went on, however, to submit that:

whales are not merely a source of protein and fat, and are not exclusively the property of the whaling industry or the [IWC]. ... As living animals they can provide the spectator with a unique recreational experience, as many South Africans who have seen the right whales that visit our coasts each year can testify. But we wonder, Mr Chairman, whether these two viewpoints of whales, as a natural resource to be rationally exploited, and as part of our natural heritage to be protected, are really irreconcilable? Is it not possible that there is room in this world for both approaches? We maintain, Mr Chairman, that all of us in this room are deeply concerned that whales should not become extinct, or severely depleted in numbers; it is just that we approach the problem from different ends. It would be a tragedy if irresponsible action on the part of any one of us should lead to the negation of our common goal.²²¹

Again, this is somewhat prescient of South Africa's future stance - but also contains some important differences. In particular, although South Africa is firmly adopting whale-watching as a usage policy, the country has moved away from the accommodation of both approaches - and South Africa does not support other countries which wish to take whales, even where this would have no impact or bearing on South Africa's whale-watching industry. That South Africa at one stage suggested, however, that consumptive and non-consumptive uses might not be incompatible is interesting; and perhaps implies that general acceptance of such an accommodation might be possible in the future.

3.2.2 *Calls for new scientific understanding*

IWC 26, London 1974, saw renewed - and more strident - calls for an ecosystem approach to management to be adopted. Per Birnie, the assumption that whale populations might recover if protected was called into question. She writes that 'mathematical models used so far had assumed that the declines were reversible; sometimes this did not occur as experience with

²²⁰ Commissioner de Jager, South Africa, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* Day Two, at 6-7. See [13](#); and (n 1984).

²²¹ *Ibid* at 7-8. See [13](#).

other species showed, though they might be “replaced” by others in the marine economy. In population theory non-reversible models are applied when two or more species are competing for the same limiting environmental factor, eg food supply’. This is prescient of debates today; as will be seen, Japan in particular argues that whale species are presently competing.²²²

The Meeting did, however, take an important step forward by adopting an Australian proposal and thereby introducing a new management procedure (the NMP). The NMP ‘recognised that the management of whale stocks should be based not only on MSY concepts related to numbers and species but should include assessment of factors such as total weight of whales and interactions between species in the marine eco-system’. Birnie argues that the ICRW was ‘proving to be a remarkably flexible document in spite of its superficial limitations’; with the ‘existence of the amendable Schedule’ being the ‘key to these new developments’.²²³ How flexible the Convention really has turned out to be is, however, still an open question.

In 1974 a resolution again proposing a ten-year moratorium on all commercial whaling was considered; submitted by the US and seconded by Mexico. The Scientific Committee reviewed, and then considered still appropriate, its advice of the previous year. It ‘drew attention’, in addition, ‘to the suggestion of possible competition between species whereby rebuilding of severely depleted stocks may not necessarily be maximised by a moratorium’.²²⁴ Competition between species is not, therefore, a new idea within the IWC. Australia, seconded by Denmark, then suggested an amendment. This ‘referred to the need to preserve and enhance whale stocks as a resource for future use and taking into consideration the interests of consumers of whale products and the whaling industry as required by the International Convention on Whaling’²²⁵ - language which Australia would be unlikely to approve of today; but Australia was at the time still a whaling nation.

The Australian amendment then recognised that ‘the management of whale stocks should be based not only on the concepts of maximum sustainable yield in number by species, but should also include such considerations as total weight of whales and interactions between species in the marine ecosystem’. The amendment then proposed that there be a three-fold categorisation of stocks of whales, as the SC had advised: ‘initial management stocks (which may be reduced in a controlled manner to achieve MSY levels or optimum levels as these are determined); sustained management stocks (which should be maintained at or near MSY levels and then at optimum levels as these are determined); protection stocks (which are below the level of Sustained Management Stocks and should be fully protected)’.²²⁶ The resolution was adopted by majority vote in the plenary session; although the words ‘as a resource for future use’ became ‘as a resource for present and future use’.²²⁷

²²² P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 447-448. Per Birnie, further, ‘[o]bservers of the IWC were now beginning to demand not only reductions in overall numbers caught, although they still regarded this as important, but that introduction of the ecosystem approach to management was now a matter of urgency and that management was now a matter of urgency and that management in general should be more discriminating’. *Ibid* at 453-454. Clearly, what was meant by the ‘ecosystem approach’ was what we might now call ‘preservation’.

²²³ *Ibid* at 453-454. See (n 144), (n 151), (n 408), (n 424), (n 813) and (n 873).

²²⁴ ‘Chairman’s Report’ International Whaling Commission *Twenty-Sixth Report of the Commission 1974-75* (1976) 26 at 25-26. [Chair: I Rindal, Norway.]

²²⁵ *Ibid* at 25-26.

²²⁶ *Ibid* at 25-26.

²²⁷ *Ibid* at 25-26.

The US stated that it had voted for the resolution because it felt that it represented a significant step forward in the management of the world's whales - but that the US still supported a ten-year moratorium. A number of other Commissioners expressed their agreement with this view'.²²⁸

In 1975 and 1976 the IWC wrestled with implementing the NMP.²²⁹ New Zealand, presumably feeling that the IWC was heading in a direction it approved of, rejoined in 1976.²³⁰

3.2.3 *American difficulties*

An important step was taken in 1976, with the Commission, for the first time, adopting 'a Resolution on the bowhead whale fishery off Alaska calling for steps to be taken to limit its expansion and to reduce the rate of whales struck and lost'.²³¹ According to the *Chairman's Report* for IWC 28, the Technical Committee and the Scientific Committee pointed out to the Commission that steps should be taken to limit the taking, as well as the 'struck and lost' rate, of bowhead whales off North America; and that both the US and Mexico should be requested to counter 'harassment' of gray whales in breeding areas. Denmark, according to the Report, proposed the adoption of resolutions to support both of the Scientific Committee's recommendations and, with slight amendments, both were adopted by the Commission.²³²

3.2.4 *The 1977 Meeting; and the link with CITES*

In 1977, the US Commissioner, in his opening address, delivered a message from US President Carter; which included the suggestion that the US hoped 'to see all whaling nations, as well as interested non-whaling nations, join in the important work of the IWC so that we may create a truly effective and representative system to safeguard whales for the future'.²³³ The joining of the IWC by non-whaling nations, of course, has since become an important and contentious issue. The President's words presaged the shift in membership in the late 1970s and early 1980s which was eventually to lead to the moratorium being adopted; but which was also to contribute to the present deadlock.

At IWC 29, Canberra 1977, according to the Chairman's Report, 'Canada explained that the IWC can supply expert advice to the CITES on the status of whales in relation to their criteria,

²²⁸ *Ibid* at 25-26.

²²⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 464.

²³⁰ *Ibid* at 465.

²³¹ *Ibid* at 468-469.

²³² 'Chairman's Report of the 28th Commission' reported in the International Whaling Commission *Twenty-Seventh Report of the Commission 1975-76* (1977) 22 at 28. The Resolution read as follows:

Bowhead whales: The International Whaling Commission having noticed the evidence for an increased effort on bowhead whales in the North American Arctic which species generally is protected in all Oceans; concerned that the continued relatively high loss rate of struck whales in Alaska should be reduced (without increasing the total take); noting the recommendations of the Scientific Committee to improve assessments of current population; *recommends* that Contracting governments as early as possible take all feasible steps to limit the expansion of the fishery and to reduce the loss rate of struck whales.

Appendix 6 'Chairman's Report of the 28th Commission' reported in the International Whaling Commission *Twenty-Seventh Report of the Commission 1975-76* (1977) at 33.

²³³ 'Opening statement by Dr Aron, the US Commissioner to the International Whaling Commission' *Verbatim Records of the 1977 Meeting* 'Proceedings of the Meeting' at 11. See (n 1943).

while the latter Convention could assist the IWC in discouraging commercial exploitation of badly depleted stocks of whales'. The two Conventions, according to the Report, 'can therefore profit from cooperation and the Commission adopted the proposal that:

(1) The IWC offers to the CITES to act as its adviser on cetaceans. (2) The IWC accepts the CITES invitations to participate at the October meeting in Geneva ... (3) The IWC will (a) advise the CITES of the conclusions of the [SC] regarding the status of whale stocks in relation to the CITES criteria; (b) provide advice at Geneva on any exploitation by non-IWC members of those stocks whose biological status is appropriate for Appendices I or II. (4) In addition, the IWC representatives should be prepared to discuss problems of identification of cetacean parts and products.²³⁴

This is the earliest Resolution which the present writer has been able to find dealing specifically with the relationship between the ICRW/IWC and CITES.

The Australian Commissioner, according to the *Chairman's Report*, pointed to 'a potential problem with automatically absorbing the IWC's resolutions into CITES Appendices, as the two conventions meet two years apart and anomalies might therefore arise'.²³⁵ The Commissioner pointed out also that '[t]he listing of a species in Appendix II of [CITES] has the connotation that species may become threatened without regulation of trade if trade is not regulated. In the case of whales, as of many other animals, this is not necessarily true; for example, in the case of whales which are not subject to harvest'.²³⁶

The same meeting saw an accusation surface, which was eventually to become of significance, to become familiar, and even - today - to be of crucial import. In Birnie's words, the 'Japanese Commissioner (with the US's recent legislation in mind²³⁷) accused some delegations of using the NMP as a means of achieving goals incompatible with it, specifically the moratorium; and warned that the international management of whale stocks would collapse if some states used their new 200-mile zones unilaterally to enforce their own ideas of management'.²³⁸ This does show something of the view the Japanese have always taken - that the oceans are a free commons. It also shows why the eventual 'Irish Proposal' - which included the premise that whales could be taken in, and *only* in, 200-nautical mile zones was unlikely ever to gain favour with whaling states.²³⁹ Of course, in 1977 the Japanese concern was that they might be prevented from harvesting whales in other states' 200-mile zones.

A contentious issue which came again to the fore was the aboriginal taking of bowhead whales. The Commission apparently 'found the Arctic bowhead whale to be the most

²³⁴ 'Chairman's Report of the 29th Commission' International Whaling Commission *Twenty-Ninth Report of the Commission 1976-1977* reported in the International Whaling Commission *Twenty-Eighth Report of the Commission 1976-77* (1978) 18 at 23-24. According to Dr Martin:

Canada and several other members of the IWC have ratified the Endangered Species Convention and thus participated in actions taken under both Conventions. We think that the two can profit from cooperation. ... I would therefore suggest to my fellow Commissioners firstly that the IWC offer to the ESC to act as its adviser on cetaceans; ...

Statement by Dr Martin, the Canadian Commissioner to the International Whaling Commission *Verbatim Records of the 1977 Meeting* 'Proceedings of the Meeting' at 220-221.

²³⁵ Statement by Dr Radway Allen, the Australian Commissioner to the International Whaling Commission *Verbatim Records of the 1977 Meeting* 'Proceedings of the Meeting' at 221-222.

²³⁶ *Ibid* at 221-223.

²³⁷ In 1976 the US had enacted a Fisheries Conservation and Management Act extending its fisheries jurisdiction to 200 miles, ... and providing for a moratorium on whaling in US jurisdiction. P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 474-475.

²³⁸ *Ibid* at 474-475.

²³⁹ See (n 442), (n 1491), (n 1599) and (n 2287).

endangered of all whale species despite forty years of protection from industrial exploitation'. This was largely explained by the growing prosperity of Eskimos, which had led to increased catches as there was more use being made of rifles instead of hand held harpoons; the 'inaccuracy of this method of killing and the lack of expertise of the marksmen compared to those with long-acquired skills in traditional methods' leading a greater number of 'struck and lost' whales.²⁴⁰ There was also concern mooted that the species' habitat might be 'polluted or destroyed as a result of oil developments in the region'. The Commission thus agreed to maintain the protected status of the stock; and also 'completely deleted the exemption in favour of certain aboriginal fisheries; exemptions, ... derived not from the substantive treaty articles but from Schedule regulations'.²⁴¹ This ban created problems for the US with regard to its obligations to protect the cultural rights and subsistence needs of the Eskimos; but the country undertook to 'implement the IWC regulation when US national legislation problems were removed, and meanwhile promised to undertake an intensive investigation of the size of the stock'.²⁴²

3.2.5 *The South African view in 1977*

At the same Meeting, the South African Commissioner, one Mr Smith, said that:

[a]s you have been informed at the 28th Meeting ..., South Africa ceased whaling at the end of 1975. However, this decision was one which had been reached by the whaling company on economic grounds and did not reflect any moves by the South African Government to ban whaling. In fact, South Africa would like to keep her options open for the future despite a present lack of an industry. It has decided to retain the membership of the [IWC] and to continue with whale research. Although South Africa is no longer whaling actively, her attitude to the industry will still remain the same. We would consider it to be hypocritical for South Africa to become an overnight preservationist. Rather will South Africa be taking a conservationist approach, where conservation is defined as: 'The wise use of a resource'. In this approach, South Africa will be guided by the statements of the scientific committee. We believe that there is plenty of room for a middle-of-the-road approach to whaling matters. South Africa would therefore like to take a stand on such an approach.²⁴³

This is an early example of the use of the terms 'conservation' and 'preservation' in the sense in which they are largely being used in the present thesis - and, ironically perhaps, remains a fairly accurate description of South Africa's present attitude. However, in the succeeding decades it was to become more and more difficult for states to take a 'middle-of-the-road' approach. As the numbers race within the IWC has escalated in recent times, with occasional majorities of only one or two votes, it has become difficult for a state to sit on the fence; as doing so might precipitate the passing of a Resolution, and even pushing the IWC in a direction, to which a state's normal allies might be opposed. This has apparently led on

²⁴⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 485-486. At the same Meeting, the Canadian Commissioner said:

[m]y delegation has a particular interest in whale stocks which migrate off our coast, and I would like to draw special attention to the management of Arctic bowhead whales. IWC scientists have indicated that these stocks have been depleted to dangerously low levels. The bowhead must be allowed to recover, and we will be seeking the Commission's support to take forceful protective action.

'Opening statement by Dr Martin, the Canadian Commissioner to the International Whaling Commission *Verbatim Records of the 1977 Meeting* 'Proceedings of the Meeting' at 16.

²⁴¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 485-486.

²⁴² *Ibid* at 485-486.

²⁴³ 'Opening statement by Mr D S Smith, the South African Commissioner to the International Whaling Commission *Verbatim Records of the 1977 Meeting* 'Proceedings of the Meeting' at 27. See 13, generally.

occasion to states taking extraordinary measures to avoid being placed in positions where they might be called on to vote.²⁴⁴

3.2.6 The bowhead issue in 1977

The June 1977 ban on the taking of bowhead whales had a consequence which was to echo some fifteen years later - in 2002, as will be seen.²⁴⁵ After the United States had lost the right to have its Eskimo people take bowhead whales, a Special Meeting was held in Tokyo in December 1977. At the Special Meeting the Commission was asked by the US to reconsider the earlier decision to prohibit the taking of bowhead whales from the Bering Sea stock.²⁴⁶ The Commission then agreed to a Resolution²⁴⁷ which effectively overturned the earlier decision.

When, in May 2002, the US - and the Russian Federation - lost their aboriginal quotas, they immediately called for a Special Meeting - which was held in October of the same year.²⁴⁸ In 2002, as will be seen, the US made concessions to pro-whaling countries in order to recover the lost quota; and it seems to the present writer indisputable that similar negotiations behind closed doors preceded the Special Meeting in 1977. International diplomacy is seldom transparent.

3.2.7 The bowhead issue in 1978

The same issue arose, however, at IWC 30, London 1978, where, in Birnie's words, 'controversy arose ... concerning [the Bering Sea stock of bowhead whales]. A small catch had been permitted to the Alaskan Inuit Eskimos under the aboriginal subsistence exemptions at the Tokyo Special Meeting in December 1977, although the IWC had at the 29th Meeting

²⁴⁴ As an example of this, the present writer was told by an interviewee that Morocco occasionally delayed paying its membership fees deliberately so as to avoid being required to vote, where its vote might have placed it in an embarrassing position. Although not officially off the record, the communication did not form part of the recorded interview and I have chosen not to attribute it.

²⁴⁵ See 3.3.9, 3.3.10, 10.2.2 and 10.2.3.

²⁴⁶ IWC 'Chairman's Report of the Special Meeting, Tokyo, December 1977'.

²⁴⁷ According to this new Resolution:

WHEREAS ... at its 29th Annual Meeting ... in June 1977, the Commission, acting upon the advice of its Scientific Committee, agreed on the establishment of a total moratorium on the hunting of bowhead whales, WHEREAS ... the Commission has reviewed its June 1977 decision as regards the Bering Sea bowhead stock, taking into account representations made concerning aboriginal subsistence and cultural needs, the degree of risk inherent in related proposals, and the management and research program prepared by the USA, WHEREAS the Commission has concluded that a harvest, limited to the striking of 18 whales or the landing of 12, should be permitted from this stock for 1978, and has noted that, pursuant to undertakings by the Governments of Canada and the USSR, this harvest will be taken exclusively by persons under the jurisdiction of the Government of the United States, BE IT HEREBY RESOLVED by the International Whaling Commission (a) that the Commission calls upon the Government of the United States to take all necessary measures to minimise adverse effects upon the Bering Sea stock resulting from the aboriginal hunt, through controls on hunting techniques and equipment, size limits, seasons, and the kill or striking of calves, and females accompanied by calves, (b) that the Commission welcomes the undertaking of the Government of the United States to implement management and research programs of the comprehensiveness of those tabled at the meeting of the Scientific Committee held in Australia in November of 1977, and to establish surveillance and enforcement measures for the 1978 hunt adequate to ensure that the number of whales struck does not exceed the limit established by the Commission, (c) that the status of the Bering Sea bowhead whale stock be reviewed at the Commission's 30th Annual Meeting in June, 1978 in the light of information resulting from the proposed research program, with a view to establishing regulations based on the advice of the Scientific Committee, which should include comments on risks associated with different levels of removals from the stock, (d) that all necessary measures be taken to ensure that the reduction in the take of bowhead whales does not affect the take of beluga whales to any significant degree, (e) that all necessary measures be taken to preserve the habitat of bowheads and beluga whales.

Resolution of the International Whaling Commission 1977 Special Meeting, Appendix 2: Bering Sea Bowhead Whales, IWC 'Chairman's Report of the Special Meeting, Tokyo, December 1977'.

²⁴⁸ See 3.3.9, 3.3.10, 10.2.2 and 10.2.3.

accepted the SC's advice that the aboriginal exemption be withdrawn in relation to this stock because of its critically depleted state'.²⁴⁹ In London, the US, 'supported by intensive lobbying from Eskimo observers present' sought a quota for 1978-79 of 27-29 whales 'for Eskimo nutritional needs' - or 32 whales (which would mean 2% of the known stock) 'if cultural needs were taken into account, since the very limited 1978 quota was said to have caused great hardship to Eskimos'.²⁵⁰

The SC, however, continued to advise that for biological reasons a quota of zero remained the most advisable course. Despite this, the IWC eventually approved a quota of 18 landed and 27 struck. The US was certainly in a difficult position - its Eskimo people had gone so far in the US as to initiate legal action 'alleging denial of their constitutional rights'.²⁵¹ More diplomacy followed. Late in the Meeting the US, without giving requisite notice (as required by the IWC's 'Rules of Procedure') of its intention to do so, asked for two additional bowheads to be added to the 1978 Autumn hunt. The Commission agreed; although with an understanding that the entire issue of aboriginal whaling should be reviewed.²⁵²

At the 1978 Meeting, according to the *Chairman's Report*, the US 'put forward specific proposals for future action including a catch limit set at the aboriginal subsistence needs but which would [take] not more than 2% of the stock size, coupled with continued research'.²⁵³ After much debate and several unsuccessful votes on different proposals, the Commission adopted (nine to one, with seven abstentions) a proposal that 'in 1979 hunting shall cease when either 27 have been struck or 18 landed'.²⁵⁴ Finally, however, 'at the very end of the meeting, the US asked for [two] more bowhead whales to be added to the 1978 catch limit, to be taken during the fall hunt. The USSR, Denmark and Iceland seconded this proposal to amend the Schedule paragraph 11 to read: "(a) In 1978, hunting shall cease when either 20 have been struck or 14 landed." The Commission adopted this change [ten to one, with six abstentions], but because of the lack of advance information and the unusual circumstances of the proposal, agreed to seek legal advice on the validity of this decision'.²⁵⁵

The US also produced new figures for population estimates; arguing that its 'research programme has determined that the bowhead population is close to 2 300 whales, or almost twice the size of our best estimate of last year, and the estimate on which the Commission

²⁴⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 500-501. Per Birnie, '... [t]he Special Meeting later allowed, in view of the special case made by the [US], a 1978 catch of [12] landed and [18] struck (about 1% of the stock of 1 300 as then estimated). The [US] had undertaken to review the stock, ... and now reported that 1 758 bowheads and 29 baby whales had been sighted after an intensive sighting programme, giving an estimated population of between 1 783-2 865 (averaging 2 064), considerably more than the original estimate. Only ten whales had been landed in 1978 and only another five had been struck and lost, which represented a considerable improvement on previous catching efficiency'. *Ibid* at 500-501.

²⁵⁰ *Ibid* at 500-501.

²⁵¹ *Ibid* at 500-501.

²⁵² *Ibid* at 500-501.

²⁵³ IWC 'Chairman's Report of the Thirtieth Annual Meeting' (26-30 June 1978), London at 26.

²⁵⁴ *Ibid* at 26.

²⁵⁵ *Ibid* at 26. Late in the day, just before the close of the meeting, the US asked for:

the forbearance of the delegates here for an intervention I wish now to make. ... The proposal will be an amendment to the schedule of the IWC Convention which would allow the additional taking of two bowhead whales during the fall hunt. ... I suggest this ... because I believe the Eskimos will need additional food to see them through the winter and ... because I believe that the Eskimos cannot help but comply with an additional reasonableness by this Commission.

Commissioner Mr R Frank, United States, IWC Report of the Plenary Sessions (26-30 June 1978) *Verbatim Record* at 126-127.

based its decision last year. ... The risks imposed on the whale population by permitting a modest hunt are small when compared with the countervailing risks to human populations if the hunt is not permitted'.²⁵⁶ The US Commissioner also said, later and revealingly, that, at the time of his speaking, the Eskimo advisers to their delegation had returned home from London and had indicated that:

in light of the vote yesterday, and what they assumed would happen today, they would not comply with what the IWC has done. I mention that because that means that we may have compliance problems of a significant nature. We may have a confrontation in the United States with native peoples. ... if the [lower] figure is accepted, I foresee non-compliance and blood on all of our hands and it may not only be the blood of Eskimos but the blood of more whales than we are talking about here today if the Eskimos do not comply.²⁵⁷

The above is startlingly reminiscent of the arguments made in recent times, as to risk balancing and non-adherence, by the Japanese when pressing the claims of their coastal whaling people (whom the Japanese contend ought to be considered as being at least equivalent to aboriginal subsistence whalers).²⁵⁸

As would eventually happen in 2002, other states took advantage of the US's difficulties. Birnie argues that it was to the advantage of whaling states to accede to the US's demands for an aboriginal quota; as the concession 'undermined the US's previous efforts to press a moratorium on the IWC'. The problem, Birnie contends, 'persisted into future meetings and enabled the USSR, Japan and other commercial whaling states to bargain for higher quotas than might otherwise have been acceptable to the US and its supporters in the Commission'.²⁵⁹

The precedential value to pro-whaling countries of the United States' awkward position in respect of aboriginal whaling is significant.

South Africa, at the same meeting, argued in favour of taking decisions based on scientific evidence. The South African Commissioner said that:

... a striking feature [of past reports is] the recent tendency towards extreme positions within the Commission. But this appears to have had a positive effect for it seems as if more heed is now being paid to scientific advice, ... when making decisions about the management of whale resources South Africa will largely be guided by the advice of the Scientific Committee, but we are also acutely aware of the need for a strong and scientifically active Commission, and we will therefore very carefully consider the impact which extreme actions could have on the Commission and ultimately on the resources.²⁶⁰

²⁵⁶ *Ibid* at 7.

²⁵⁷ *Ibid* at 30-31.

²⁵⁸ See 10; esp. at 10.1, 10.3, 10.4. See also 14.1.2.

²⁵⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 500-501. Birnie explains that '[a]s the US had been one of the leading proposers of a Moratorium in the Commission and had several times drawn the Commission's attention to the model of the moratorium on whaling (except for the aboriginal catch), applied in the US 200 mile fishery zone under the Marine Mammal Protection Act, it was in the interest of member states still engaged in commercial whaling that the [US] should be enabled to receive this concession which undermined the US's previous efforts to press a moratorium on the IWC. Other members faced the dilemma of sympathising both with the Eskimo case and with the constitutional difficulties experienced by the USA over this issue, since some of them, eg Denmark, also had ethnic and cultural minorities whaling within their territories'. *Ibid* at 500-501.

²⁶⁰ Commissioner Dr Newman, South Africa, IWC Report of the Plenary Sessions (26-30 June 1978) *Verbatim Record* at 17-18.

South Africa today has a slightly more difficult argument to make, as the scientific argument against commercial whaling of certain species is weaker; but the country does continue to make essentially the same point, while favouring the anti-whaling group of states - probably for political reasons as much as scientific.

3.2.8 The Special Meeting, 1977; and the relationship between the IWC and CITES

In 1977, in the *Chairman's Report* of the IWC Special Meeting, it is recorded that 'the Secretary reported on the special working session of the CITES held in Geneva, attended by the Chairman and Secretary on 25-28 October 1977'; that '[c]ross-representation between the two conventions would be of mutual benefit, and the CITES was to offer Observer status to the IWC at meetings of the Parties'; and that '[t]he Commission agreed that the CITES should be granted Observer status at its meetings and those of the Scientific Committee'.²⁶¹

In the 1977-78 Report, it was stated that the Commission had 'offered to act as an adviser to the CITES on cetaceans, and the Chairman and Secretary attended the special working session of the CITES held in Geneva, 25-28 October 1977'.²⁶² Because, it was suggested, 'of the mutual profit resulting from cooperation between the two Conventions, cross-representation at observer level has been granted by each to the other. In addition, the IWC Secretariat is providing direct assistance to the relevant UK authority which has offered to undertake a review of cetacean species for the Appendices to the CITES'.²⁶³

The *Chairman's Report* for IWC 30 recorded that the '[o]bserver from the CITES made a statement welcoming the mutual granting of observer status agreed between the CITES and the IWC'. Further that '[t]he CITES now has 46 member states including 10 IWC members, and he appealed to those not in the CITES to join. The Second Meeting of the Conference of Contractin Parties will be held in Costa Rica, 19-30 March 1979. There is growing cooperation between the two Conventions, and the IWC is invited to be represented at the Costa Rica meeting'.²⁶⁴

Importantly, the representative of CITES to the IWC, Mr P H Sand, the first CITES Secretary-General, said:

[CITES] has now been in existence and force for three years. As you know, the secretariat functions for this convention have been entrusted to IUCN by the executive director of the United National Environment Programme. The membership of CITES has grown to 46 states, including ten of your own members - Australia, Brazil, Canada, Denmark, France, Norway, South Africa, the USSR, United Kingdom and the United States.²⁶⁵

²⁶¹ 'Chairman's Report of the Special Meeting', Tokyo, December 1977 *Twenty-Ninth Report of the International Whaling Commission 1977-78* Cambridge 1979 2 at 3. [A G Bollen, Chairman.]

²⁶² 'International Whaling Commission Report 1977-78', in the *Twenty-Ninth Report of the International Whaling Commission 1977-78* Cambridge 1979 7 at 8.

²⁶³ *Ibid* at 8.

²⁶⁴ 'Chairman's Report of the Thirtieth Annual Meeting', in the *Twenty-Ninth Report of the International Whaling Commission 1977-78* Cambridge 1979 21 at 30.

²⁶⁵ Mr P H Sand, CITES, 'IWC Report of the Plenary Sessions' (26-30 June 1978) *Verbatim Record* at 46-48.

Sand then suggested that the CITES Secretariat welcomed ‘the establishment of working relations with the IWC and the mutual granting of observer status’. He suggested that there would be ‘several consequences which this growing co-operation between our Conventions will have. First, it will progressively eliminate the need for the provisional reservations expressed by some governments, vis-à-vis certain cetaceans listed on the appendices of CITES. These reservations were made before your Canberra meeting last year by four governments, Australia, Canada, South Africa and the USSR’.²⁶⁶ These reservations, per Sand, ‘were limited to stocks of sei whales and fin whales and the reasons given in the case of Australia, for example, were precisely to preserve that country’s position at the Canberra meeting of the [IWC]’. Sand then appealed to these states to withdraw their reservations ‘in the light of the co-operative relationship established with the IWC’; and appealed to those IWC member-states which had not yet ratified CITES to do so. Interestingly, he suggested that one of the reasons why certain states - including Iceland, Japan, The Netherlands and New Zealand - might not have ratified CITES was because of concerns over the relationship between the two bodies.²⁶⁷ Sand then concluded with an appeal for a continuous and mutual exchange of information between the two Conventions.²⁶⁸

3.2.9 *The Special Meeting, 1978; and the Resolution on the IWC and CITES*

As in 1977, at the end of 1978 there was a Special IWC Meeting; held in December in Tokyo. The ostensible reasons for the holding of the Special Meeting were to set North Pacific sperm whale stocks for the 1979 season; and to resolve certain financial issues. However, the Parties took the opportunity to raise a number of other matters. One of these, a ‘Resolution to the CITES’, proposed by the US and seconded by the Netherlands, ‘concerning support of IWC actions by the CITES was adopted by five votes to four with six abstentions. Canada, Denmark, Iceland and Japan expressed their views on the difficulties of equating the IWC stock management categories with the CITES classifications and questioned what the Resolution might achieve’.²⁶⁹

The Resolution, as passed, read:

Resolution to the CITES: WHEREAS, it is the purpose of the [IWC] to provide for the effective conservation and management of whale stocks, and WHEREAS, the [IWC] has adopted a New Management Procedure to carry out that purpose, and WHEREAS, the [IWC] has established regulations which allow no commercial taking of certain species and stocks of whales in given ocean areas, and WHEREAS, in order to contribute to the effort to conserve whales receiving commercial protection from the [IWC] and to reinforce adherence to [IWC] regulations, it is desirable to use each international opportunity to stop the taking and to ban trade in those species and stocks of whales which

²⁶⁶ It is very interesting to note that South Africa was one of the countries which initially took out a reservation at CITES on at least certain whale species; and instructive on South Africa’s attitude at the time.

²⁶⁷ Mr P H Sand, CITES, ‘IWC Report of the Plenary Sessions’ (26-30 June 1978) *Verbatim Record* at 46-48. Sand said, further, that:

I think you will all agree that we have come a long way from Canberra and I would appeal to the governments concerned now to withdraw their provisional reservations in the light of the co-operative relationship established with the IWC’. ... ‘[a]t the same time, and essentially for the same reason, let me make an urgent appeal to those governments which have not yet ratified the Washington Convention: Argentina, Iceland, Japan, Mexico, The Netherlands, New Zealand and Panama. I know that one of the reasons for the delay in some of these cases has been a wait-and-see attitude until clarification of the relationship with the [IWC]. This obstacle, if it can be called that, has now been removed and I hope we can soon welcome these countries among our members at the next meeting of the [COP] in Costa Rica [in March 1979].

Ibid at 46-48.

²⁶⁸ *Ibid* at 48.

²⁶⁹ IWC ‘Chairman’s Report of the Special Meeting, Tokyo, December 1978’ at 5.

receive total protection from commercial whaling, BE IT HEREBY RESOLVED by the [IWC] that it request the Second Meeting of the Conference of Parties to the [CITES] to take all possible measures to support the [IWC] ban on commercial whaling for certain species and stocks of whales as provided in the Schedule to the [ICRW].²⁷⁰

In debate on the Resolution, the United States considered it an ‘important opportunity to maintain working relations between two international organizations that have overlapping concern with citations (*sic*). The Commission now may take action to reinforce these relations and urge the parties to CITES to take action to ban trade in these species and stocks of whales protected from commercial whaling by this Commission’.²⁷¹ Canada, however, argued that there was a problem with ‘trying to directly link the criteria used in the two items, one being the schedule of our convention and the other being the endangered species convention. And so, while there is a certain degree of complementarity (*sic*) particularly with regard to the truly endangered species that we all recognize. This does not extend as directly to some of those species and stocks which are closer to the sustained management category’.²⁷² This was supported by the Commissioner from Japan; and also by the Commissioner from Iceland.²⁷³ The US, however, argued that all that was being asked for was that CITES be asked to ‘take all possible measures, *possible* measures, to support the [IWC] ban on commercial whaling for certain species and stocks of whales as provided for in the Schedule. That is all that is asked for. There is nothing illegal about it’.²⁷⁴ The US contended further that there was ‘nothing inconsistent with the international law’; and that ‘the proper parties to decide what animals of fauna and flora belong [in] what place in their Convention [are] the parties to that Convention. And presumably those parties will make that judgement under the criteria in that convention’.²⁷⁵

The Netherlands argued that ‘in our opinion the Resolution ... would leave sufficient room to the Convention of or to the Meeting of the Washington Convention to decide to [take] whatever action they would take as a result of this request. This would not necessarily have to be the inclusion of the species in either one of the two appendices of the Convention but it could also be, as I see it, the adoption of the resolution to the effect of preserving a certain habitat or something’.²⁷⁶ Japan, however, argued that ‘[i]f we are not requesting those species to be listed in Annexes 1, 2, 3, in certain cases we should make it specific to the Convention. Otherwise the resolution is too obscure, ambiguous, and it does give the impression that we are requesting those species to be listed in either of the three categories. So, we have to avoid in specific terms that implication. Otherwise - I don’t think this resolution carries any significance’.²⁷⁷

²⁷⁰ Appendix D to the ‘Chairman’s Report of the Special Meeting of the IWC, Tokyo, December 1978’.

²⁷¹ US Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 86.

²⁷² Canada Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 88.

²⁷³ Japan Commissioner & Iceland Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 89.

²⁷⁴ US Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 89-90.

²⁷⁵ *Ibid* at 89-90.

²⁷⁶ The Netherlands Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 92-93.

²⁷⁷ Japan Commissioner, IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 93.

Eventually, of course, parties were to do several ‘flip-flops’ and today sees the anti-whaling IWC member states arguing - broadly - that as long as there is a moratorium on commercial whaling in place under the IWC, CITES should not approve trade quotas for whale species; and that, generally, CITES ought to continue to recognise the IWC as the competent body for cetacean management decisions. On the other hand, Japan has turned to the argument that as the IWC is deadlocked, with anti-whaling member nations showing no willingness to end the moratorium on commercial whaling, CITES ought to step in and take management decisions. On several occasions, Japan has also arguably even tried to use CITES to circumvent, or even to undermine, the IWC.

In the event, Argentina, Canada, France, Norway, South Africa and the United Kingdom abstained; Australia, Mexico, The Netherlands, New Zealand and the US voted in favour; and Denmark, Iceland, Japan and the USSR voted against. The Resolution was therefore passed by majority vote.²⁷⁸

3.2.10 *American pressure*

By the mid-1970s, the United States had begun to flex its muscles. The passing in its domestic law of the Pelly Amendment to the Fisheries Act, discussed later,²⁷⁹ gave the US the ability to take action where other states party to the ICRW did not act according to the US’s ideals. The US had clearly therefore decided to move away from ‘tactful lobbying’ and toward direct action. However, it is important to recognise that many other considerations would play a role in the US’s decisions on whether or not to use the weapons with which it had armed itself. The US has never (or certainly not since domestic pressure against whaling began in the 1960s) been entirely clear on what its standpoint on whaling is; and many vested interests come into play when the US chooses whether to act in international law or not. According to Day, for instance, the Packwood-Magnuson Amendment to the International Fishery Conservation and Management Act needed to be passed by the US Senate, ‘to force government’s hand [in 1979], because of the American administration’s refusal to use Pelly Amendment sanctions against Japan’.²⁸⁰ Domestic politics in the United States, of course, means that nothing is simple and ‘political will’ is not always represented by the laws which happen to be on the books.

By the mid-1970s it was obvious to those willing to open their eyes that whale populations were in serious trouble. It was estimated at this time that before whaling began there were approximately 3.9 million whales in the oceans of the world; but that by 1975, whaling had reduced the number of whales to approximately 2.1 million, with the mature (and therefore exploitable) population of whales having decreased from about 2.4 million to about 1.2 million. These figures, however, were described as being deceptive as, firstly, the selectivity of the whaling industry has caused proportionately much greater reductions in the populations

²⁷⁸ IWC ‘Report of the Plenary Session’ Special Meeting of the International Whaling Commission (19-20 December 1978) *Verbatim Record* at 95.

²⁷⁹ See 8.4.

²⁸⁰ D Day *The Whale War* (2nd ed, 1992) at 116. Per Day, ‘[t]his amendment ruled that any nation violating IWC rulings would be banned from fishing within the US 200-mile limit. For many of the whaling nations this was a severe sanction. In Japan’s case it was unthinkable. Its \$40-million whaling industry would cost its fishing industry \$500 million in lost fishing rights’. *Ibid* at 116. See 8.4.

of certain species, especially the larger baleen species; for example, while worldwide whale populations had been reduced by about 46 percent, some baleen whale species in the Antarctic had been reduced by as much as 96 percent. Second, the figures on population reductions did not reflect reductions in whale biomass; the point being that selective depletion of blue and fin whales had caused an 85 percent reduction in the total baleen whale biomass in the Antarctic, from an estimated 43 million metric tons to 6.6 million metric tons.²⁸¹

The proponents of the ecosystem approach in the mid-seventies could argue, as above, that whales generally were in trouble; today, however, the same argument - selective depletion - is used by proponents of a return to commercial whaling, as will be seen.

By IWC 31, London 1979, membership had increased to 23 - the new members, however, being more pro-use than pro-conservation (in the 'preservation' sense). Of importance, though, was the joining of the Seychelles - a tiny country which was to punch above its weight; and which had an immediate and important impact, arguing in favour of creating whale sanctuaries. Australia suggested that the IWC should begin considering the economic effect (particularly on aboriginal communities) of a global moratorium. The bowhead whale issue arose again with the US seeking an aboriginal quota even though the Scientific Committee had advised that no quota be allowed.²⁸² In Birnie's opinion, 'the US's need to seek a bowhead quota for the Alaskan Eskimos in spite of the SC's advice that there should be zero quotas led to other political bargains enabling the US to secure approval for an Eskimo take of 18 (26 struck)'.²⁸³

At the same Meeting an initiative by Panama to eliminate sperm whaling in the Antarctic by placing a moratorium on whaling by factory ships in that area was accepted. Nevertheless, it was accepted only with major compromises - an exclusion of minke whales being agreed to accommodate Denmark, and the area of exclusion being reduced to accommodate both Japan and the USSR.²⁸⁴ One point to note is that the moratorium was becoming the most popular solution proposed - probably, its non-permanent nature made it seem inherently a compromise. The idea of compromise was becoming entrenched - not altruistically, however, but in self-interest.

One assessment of the period is that the introduction of the NMP approach meant a fundamental change in the nature of the Convention. However, the major criticism from the period remained: that 'the NMPs, for all their promise, were in fact unworkable, since they did not, it was alleged, take sufficient account of the ecological aspects of stock recruitment and assessment, including a variety of ecological factors, and the interrelationship with catches permitted on other related species by other bodies, which not only affect the ecological balance of whale stocks but lead to by-catches of whales'.²⁸⁵ At this time, speaking of an 'ecosystem approach' generally meant that the speaker was opposed to whaling.

²⁸¹ J E Scarff 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)' (1977) 6 *Ecology Law Quarterly* 323 at 331-332.

²⁸² P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 505-506.

²⁸³ *Ibid* at 505-506.

²⁸⁴ *Ibid* at 504-505.

²⁸⁵ *Ibid* at 507.

3.2.11 New membership and changing times

At IWC 27, 1975, the Commission had discussed catch quotas in areas where non-members took significant numbers of whales; and ‘agreed that these whaling nations should be invited to join the Convention because their activities are weakening the Commission’s conservation and management systems which are binding on member nations’.²⁸⁶ The UNEP observer to the IWC had commented on this issue; saying that his organisation had already approached non-member whaling nations, ‘but had received negative replies’. The Latin American States, it seems, had their own organisation and were therefore reluctant to commit to the IWC. A small working group was then set up, comprising Canada (convening), Denmark, Iceland, the UK and the US to ‘review the whole matter of the adherence of non-member nations and the effects of their catches’; and the Commission adopted [a] resolution which, *inter alia*, ‘requested that the non-member states cooperate to avoid over-exploitation and join the Commission’.²⁸⁷ This is an interesting thing as, although it was active whaling states which were targeted, it makes it clear that the IWC has never been averse to bringing new states on board; in fact, that it has been active policy. In due course, and into the future, this was to change, and may yet change, the face and nature of the IWC.

At the 29th Annual Meeting, Canberra 1977, a [US-proposed; Canadian-seconded and then Canadian-amended] Resolution was adopted on the Prevention of Importation of Whale Products.²⁸⁸ Japan objected to the resolution because, in the words of its Commissioner, Dr Yonezawa, ‘[m]y delegation cannot find it possible to associate with this resolution, because of the implications of GATT. ... Also, I think it is not good practice to penalise non-member countries by imposing these kinds of regulations’.²⁸⁹ At this stage, then, Japan was opposed to the involvement of other bodies than the IWC in whale management and trade decisions.

1979 has been described as an important year in the history of whale conservation - with ‘conservationism’ having become a ‘very powerful force at the IWC’; M’Gonigle suggesting that although the negotiations of that year ‘produced only another incremental decline in the quota level, the process of achieving that reduction and the nature of the quota itself represent

²⁸⁶ ‘Chairman’s Report’ International Whaling Commission *Twenty-Seventh Report of the Commission 1975-76* (1977) at 26.

²⁸⁷ *Ibid* at 26.

²⁸⁸ The wording of the Resolution was as follows:

WHEREAS it is the purpose of the [IWC] to provide for the effective worldwide conservation and management of stocks, WHEREAS the said Commission has adopted a New Management Procedure to carry out that purpose, WHEREAS the said Commission recognises that the effective implementation of its worldwide conservation and management programme requires the participation and support of all whaling nations, WHEREAS several non-member nations continue to harvest whales outside the regulatory regime of the Commission, WHEREAS the Commission has previously addressed appeals to these non-member nations urging them to join the Commission and abide by its decisions under the New Management Procedure, BE IT HEREBY RESOLVED by the [IWC] to renew its invitation to these non-member whaling nations to join the Commission; BE IT FURTHER RESOLVED that the member nations should actively seek to encourage membership by all non-member whaling nations, and should take all necessary steps, including such amendments to their laws and regulations as may be required, to prevent the import into their countries of whale products from non-member nations, in the interest of ensuring effective conservation and management of whale stocks; and BE IT FURTHER RESOLVED that Commissioners shall report to the 30th Annual Meeting of the Commission on measures they have taken to implement this Resolution.

Chairman’s Report of the Twenty-Ninth Meeting, Appendix 7, reported in the International Whaling Commission *Twenty-Eighth Report of the Commission 1976-77* (1978) 18 at 31.

²⁸⁹ ‘Statement by Dr Yonezawa, the Japanese Commissioner to the International Whaling Commission *Verbatim Records of the 1977 Meeting* ‘Proceedings of the Meeting’ at 213.

a major change from the past'. The new membership of six states, which brought the total membership to 23, included countries such as Sweden and the Seychelles, which had joined 'specifically to advance the cause of whale conservation and were active in doing so'. Although the four other new members - Chile, Peru, South Korea, and Spain - 'were whaling countries that had previously operated outside the auspices of the Commission'; the balance was shifting away from pro-whaling countries as old members (Australia, New Zealand, the UK, and the US) changed their policies.²⁹⁰

Further changes were coming. Within the IWC itself, voting patterns were beginning to change - and new states to become parties. According to Lyster, voting records from IWC meetings suggest that most new member states at this time 'joined the Convention with the express object of bringing commercial whaling to an end'.²⁹¹

In 1980 the IUCN, supported by UNEP and the WWF, had released its World Conservation Strategy.²⁹² This was by no means a 'preservationist' document - in Birnie's words, it 'does not call for cessation of exploitation of living resources but defines development as "the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life'. The Strategy then suggested that for development to be sustainable it needed to take account of all of social, ecological and economic factors'.²⁹³ Whales, however, were dealt with specifically in the document; apart from the general strategy having an impact on whale conservation in various ways.²⁹⁴

The issue of a possible world-wide ban on whaling was discussed in 1980; and the IWC's Technical Committee, by a majority vote, even recommended a French- and US-proposed amendment which would implement a moratorium on commercial whaling. Although voted on, in amended form so that it would take effect from the 1982/83 season, the proposal did not achieve the three-quarters majority necessary (the vote went 13:9, with two abstentions).²⁹⁵

The moratorium on commercial whaling was finally adopted in 1982 - ten years after being first proposed - and only after a number of developing countries had joined.²⁹⁶ Obviously, it was not solely the developing countries that pushed the moratorium - in fact, it was a number of important developed countries that switched their positions. And, too, it seems likely to the

²⁹⁰ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 170-171.

²⁹¹ S Lyster *International Wildlife Law* (1985) at 20.

²⁹² See, for instance, IUCN The World Conservation Union 'Caring for the Earth' at <http://www.ciesin.org/IC/iucn/CaringDS.html> (accessed 5 August 2008).

²⁹³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 598-99.

²⁹⁴ Again in Birnie's words:

whales are dealt with in the context of the global commons. In the light of the basic premises of the strategy it is concluded that there should be a complete moratorium on whale killing until both the ecosystem consequences of removing large population segments and the stocks' recovery capacities can be estimated; safe levels of exploitation and a system for identifying and rectifying errors can be arrived at; support by IWC members for the operations of 'pirate' or non-IWC member state operations is ended.

Ibid at 598-99.

²⁹⁵ IWC 'Chairman's Report of the Thirty-Second Annual Meeting' (21-26 July 1980), Brighton, at 18-19.

²⁹⁶ P Birnie 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937 at 952-53.

present writer that most of the developing countries were at least strongly influenced by developed countries, or by powerful non-governmental organisations within developed countries.

Attempts, pushed especially by the US, were made in the late 1970s to hold a new conference outside of the auspices of the IWC/ICRW. These attempts, however, foundered on the rocks of both the jealous guarding of sovereign rights; and of the impasse that loomed immediately between states who wished to use their Exclusive Economic Zones to prevent any whaling at all, and those who wished to use the opportunity provided by a new convention to reduce, rather than increase, the powers of the IWC. It is interesting to note that the countries which appeared most to want so to reduce the authority of the IWC were Brazil, Canada, and South Africa - Canada produced a draft for a new convention; Brazil and South Africa suggested amended texts. Eventually the Secretariat, working with these three texts, produced a composite; and Revision Conferences were attempted in 1978 (Copenhagen), 1979 (Estoril) and 1981 (Reykjavik). Ultimately, though, no revision proved acceptable - in fact, the parties did not even come close to agreeing; with fundamental disagreement even as to the purpose of the ICRW.²⁹⁷

Birnie does comment, though, that IWC 31 was extremely significant. In particular, she refers to the involvement of the Seychelles - after the Seychelles joined, she argues, 'IWC meetings were never again dominated by the whaling states'.²⁹⁸ The Seychelles, it seems, argued strongly, insisted that it was not influenced by more powerful states but was arguing in its own national interest, and achieved at least some of its fairly ambitious aims.²⁹⁹

It seems that the Seychelles took the lead at a critical juncture.³⁰⁰ However, the entry of this small developing state was followed by more - as states realised that they needed a way of breaking the deadlock on the IWC, so they began to lure in new members sympathetic to their causes. At this time the states joining appeared generally to be on the 'conservation' (anti-whaling) side.³⁰¹

M'Gonigle writes that in 1980 'negotiations over quotas and the moratorium became deadlocked as four overlapping blocs became entrenched'. These blocs were 'the nine whaling

²⁹⁷ *Ibid* at 955-56.

²⁹⁸ *Ibid* at 959-60.

²⁹⁹ *Ibid* at 957-59. 'The Seychelles', per Birnie, 'carefully and strategically prepared its Indian Ocean sanctuary proposal and was rewarded for its efforts. ... At the 1979 IWC meeting, ... the sanctuary was approved by the IWC by a vote of [16] to three. The Seychelles' proposal for a three-year worldwide moratorium on commercial sperm whaling fared less well. ... Notably, ... Korea [] voted against it and Chile abstained.' *Ibid* at 957-59.

³⁰⁰ *Ibid* at 959-60. As Birnie puts it, '[t]he Seychelles' dramatic entrance coincided with a point at which the United States, previously the leader of the conservationist states, found its hands tied by the need to oppose Scientific Committee advice in favor of zero quotas on Alaskan Bowhead whales'. *Ibid* at 959-60.

³⁰¹ New members included Oman (1980); Dominica, China, India, Jamaica, St Lucia, St Vincent and the Grenadines, and Uruguay (1981); and Antigua and Barbuda, Belize, Costa Rica, Egypt, Kenya, Monaco, the Philippines, and Senegal (1982). After Senegal joined, IWC membership stood at forty - very different from the small group of stalwarts in the early decades of 'club' membership. *Ibid* at 959-60. Birnie suggests that 'as concern about the whale populations and the unreliability of theories for estimating sustainable stocks persisted, pressures by other members on ... states increased. Pressure took several forms, including threats of certification under United States laws, the proliferation of new treaties and principles outside the ICRW (eg, the large number of states joining the CITES), the conclusion of the more ecologically based [CCAMLR], and the Convention on Conservation of Migratory Species of Wild Animals'. *Ibid* at 960.

nations',³⁰² 'coastal states, led by Canada, which sought to restrict IWC jurisdiction within their 200-mile exclusive economic zones',³⁰³ the US, 'which demanded a large bowhead quota for the Alaskan Eskimos in spite of the committee's zero quota recommendations'; and the eleven countries which took a 'conservationist' stance.³⁰⁴ South Africa is not mentioned - the present writer's guess would be that the country (as a political pariah at the time) would simply have done its best to stay out of the spotlight on this particular issue. As a result, in M'Gonigle's view, 'of compromises struck at the end of the negotiations,' the IWC rejected the moratorium proposal and many of the SC's recommendations for lower or zero quotas and granted the [US] a substantial bowhead quota'.³⁰⁵

At IWC 32, Brighton 1980, membership grew to 24. Oman became the first Middle Eastern, and Switzerland the first landlocked, state to join. With all members attending, there were, basically, nine whaling and 15 non-whaling states. Interestingly, Taiwan (which was at the time a whaling state) had also applied for membership but its application had been rejected by the depositary government (the US) on the ground that only two of the IWC's members (Rep of Korea and South Africa) then recognised Taiwan's government.³⁰⁶

It seems that at the time it was unclear even what sort of moratorium was in issue; after the pelagic whaling ban in 1979. The contenders were, firstly, a complete worldwide moratorium on all whaling, commercial and non-commercial, as proposed by Australia in 1979; secondly, a moratorium on commercial whaling only, which proposal was put forward by the US; and, thirdly, a moratorium on sperm whaling only.³⁰⁷ From the viewpoint of 'conservationist' (anti-whaling) states, in Birnie's judgment, '[t]his was not a successful meeting, ... [as] all three forms of moratoria were rejected; bowheads were permitted to be taken; cuts in quota were small due to political compromises; the cold harpoon ban was partial only; and attempts to expand the ICRW to small cetaceans provoked serious legal objections'.³⁰⁸

IWC 32 therefore saw an impasse, which was becoming the norm, between the pro-whaling and non-whaling states - and no resolution.³⁰⁹ After the frustrations of this meeting, however, the so-called 'conservationist' (anti-whaling) states increased their efforts to attract new members.³¹⁰ Not all of the new members were particularly committed to - or even very interested in - the IWC. Dominica, Jamaica and Egypt, for instance, made token efforts at participation only. Canada, however, decided to leave the IWC altogether - not wishing, probably, to face the same internal division as the US over the aboriginal whaling issue.³¹¹

³⁰² Brazil, Chile, Iceland, Japan, Korea, Norway, Peru, Spain, and the Soviet Union. R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 237, fn 498.

³⁰³ Argentina, Brazil, Chile, Mexico, Peru, and Spain were especially sensitive to Canadian arguments. *Ibid* at 237, fn 499.

³⁰⁴ Argentina, Australia, France, Mexico, the Netherlands, New Zealand, Oman, the Seychelles, Sweden, Switzerland, and the United Kingdom. *Ibid* at 237, fn 501.

³⁰⁵ *Ibid* at 237.

³⁰⁶ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 600-601. See (n 937).

³⁰⁷ *Ibid* at 602-603.

³⁰⁸ *Ibid* at 602-603.

³⁰⁹ P Birnie 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937 at 961-62.

³¹⁰ *Ibid* at 961-62.

³¹¹ *Ibid* at 962-63. It is, however, not known why Canada left - Birnie is speculating here. See (n 317) and (n 404).

As an example of how feelings were changing, South Africa reported of its domestic legislation, in 1980, that the ‘recent amendment of Regulation 89 of the Sea Fisheries Act no 58 of 1978, forbids any person to offer his services or make available his expertise for any activities associated with [pirate] whaling’.³¹²

3.2.12 *The looming moratorium*

The expanded membership paid dividends for the ‘conservationist’ states almost immediately. At IWC 33, 1981, the moratorium to come was clearly presaged. In 1981, an indefinite moratorium was placed on sperm whale hunting - the vote went 25:1 (Japan), with 3 abstentions (China, Iceland and the USSR).³¹³

Also at IWC 33, many of the new members made opening statements which indicated clearly their support for the move toward a moratorium. St Lucia’s Commissioner, for example, suggested that ‘oceans and their flora, fauna and mineral resources’ were, in his country’s view, ‘humankind’s “common inheritance”...’; although countries such as Costa Rica, India, St Vincent and Uruguay indicated that while they agreed with this ‘common heritage’ approach; they were not in principle opposed to sustainable utilisation. St Vincent suggested that whales, if their population levels recovered, could be used again. India gave an interesting indication of their views in supporting ‘the concept of conservation coupled with sustained development’;³¹⁴ and in emphasising support for CITES.³¹⁵ ‘In short’, concludes Birnie, ‘though most developing states members were united in their support for the global moratorium, at least on the basis of a ten-year proposal, many still wanted to retain the option of exploiting whales not yet regulated and also to leave open the long-term possibility of resuming whaling if stocks ever recover’.³¹⁶ This argument does, of course, mean that countries such as St Lucia are not being hypocritical when they argue, as they sometimes do fervently, and vote in the 21st Century in favour of sustainable commercial whaling.

At IWC 33 membership increased to 32; with the eight new members (China, Costa Rica, Dominica, India, Jamaica, St Lucia, St Vincent and the Grenadines, and Uruguay) being mostly states favouring conservation rather than exploitation of whales. This gave the conservation group the three-quarters majority of votes necessary to amend the Schedule.³¹⁷

³¹² IWC ‘Report by the South African Commissioner on Measures taken to Discourage Whaling Operations Outside IWC Regulations’ Thirty-Second Annual Meeting’ (21-26 July 1980, Brighton) at 5.

³¹³ P Birnie ‘The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales’ (1985) 12 *Ecology Law Quarterly* 937 at 962-63. The significance of the moratorium on sperm whale hunting was not merely symbolic; but numeric also. In 1973, of a total quota of 37 500 whales, 23 000 were sperm whales’. R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 143, fn 114.

³¹⁴ This extremely clumsy term is often found in older texts; newer texts refer consistently to ‘sustainable development’.

³¹⁵ P Birnie ‘The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales’ (1985) 12 *Ecology Law Quarterly* 937 at 962-63.

³¹⁶ *Ibid* at 963-64.

³¹⁷ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 608-609. Birnie records that ‘[o]ver fifty NGOs were observers at this meeting. Canada, meanwhile, had served notice of withdrawal, effective from June 1982, and was represented only by an observer at this and subsequent Meetings. ... It was more its political isolation in voting against the moratorium than the small cetacean issue, ... that precipitated Canada’s withdrawal’. *Ibid* at 608-609. See (n 311) and (n 404).

In its Opening Statement (verbal), India drew attention to the symbolic value of the whale - suggesting that India 'shared the concern for preserving for future generations the inestimable natural resources represented by the cetaceans which is in itself a symbol of the much broader concern for the preservation of man's environment.'³¹⁸ India then sought to link the IWC/ICRW to CITES; arguing that:

[t]he objectives set forth in the International Convention of 1946 are far from being realised. There is world-wide concern on this score, amply reflected in a resolution passed by the Third Meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, held at New Delhi four months ago, whereby the sperm whale, the fin whale and the sei whale have been placed on Appendix I of that Convention. As Chairman of the Standing Committee of CITES, representing the interests of all the Contracting Parties, which now number seventy. India considers it necessary to draw the attention of this gathering pointedly to this important development and to urge the need for a similar consensus in our deliberations here.³¹⁹

Jamaica, in its (verbal) Opening Statement, stated categorically that 'Jamaica has always felt a sense of shock at the very thought of the slaughter of a mammal of the proportions of the whale'.³²⁰ Given the ferocity with which this Opening Statement was delivered, it is of interest to note that Jamaica is not, in 2007, an IWC member. Other Caribbean countries tend strongly, in the 21st Century, to be supporters of sustainable use - so much so that many western NGOs have accused them of having been bribed by Japan; such as St Lucia, and St Kitts and Nevis. Ultimately, however, Jamaica is the largest and most economically powerful of the Caribbean countries, and also arguably the one with the closest ties to the UK, and it will be interesting to see what their stance is if they do rejoin.³²¹

Unlike Jamaica, another Caribbean nation, St Vincent and the Grenadines, was, and remains, a whaling nation. In its (written) Opening Statement the country suggested that it would like to see whales become 'useful to them' again - if whales should recover 'as a result of conservation actions by the IWC and by protective measures taken by States within their zones of national jurisdiction'.³²²

Of great interest for the present thesis is the fact that, although the country was only an observer at the meeting, Tanzania submitted a written Opening Statement. Tanzania suggested that it 'wish[ed] to express solidarity with IWC in its endeavour to ensure rational exploitation of whales which are threatened with extinction because of their indiscriminate and cruel exploitation. Tanzania being a custodian of one of the largest heritage of wildlife cannot fail to realise the danger posed to marine life by disorderly management of whales. We deplore the

³¹⁸ India Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) *Verbatim Record* at 4.

³¹⁹ *Ibid* at 5.

³²⁰ Jamaica Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) *Verbatim Record* at 6. Jamaica added that:

[i]t hasn't taken us much thought to arrive at the view that the decimation of the species, that species, would inevitably interrupt the integrity, not only of the marine ecology but of the ecology of the world itself. We also think it possibly the most savage action of which the human species is now guilty, except the slaughter of mankind itself which unfortunately goes on to a certain extent in the world. Jamaica will support any measure calculated to bring this blood-letting and destruction at least under sensible control.

Ibid.

³²¹ This point was made by Les Manley, Acting Chief Director, Economic and Social Affairs, Department of Foreign Affairs, RSA, in conversation with E Couzens at IWC 59 in Anchorage, May-June 2007.

³²² St Vincent and the Grenadines Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/STV.

rapid killings of whales which has manifested itself in all oceans' (*sic*).³²³ Along the same lines, Oman, in its written Opening Statement suggested that it 'believe[d] it is the duty of all member states, whaling or non-whaling, to conserve these resources for the future generations. We have learned from the mistakes of other people whose activities led to the complete extinction of some animals such as Dodo of Madagascar (*sic*)'.³²⁴

This meeting was apparently conducted in a much less tense atmosphere than others of recent years. The settlement of the Alaskan bowhead quota on a three year block basis had 'removed a major source of dispute and dealing'.³²⁵ However, the Meeting was not without important developments. Birnie's view is that '[a] quiet revolution occurred' - with pressure increasing for various prohibitions on whaling to be adopted. In the end, one of these proposals - for an indefinite moratorium on sperm whaling - was adopted; and was adopted by a large majority of 20 in favour to one against (Japan), with three abstentions.³²⁶

In the lead-up to the Meeting, the Technical Committee, by a majority vote, had recommended an amendment to the Schedule which would have had the effect of placing a moratorium on all commercial whaling.³²⁷ On being put to a vote, the proposal received 16 votes in favour, eight against, with three abstentions, and therefore failed.³²⁸

Birnie's assessment is that '[a] slow shift of direction in IWC policies was apparent at this meeting. The enlarged membership, drawn mainly from conservationist states, was increasing support for the various forms of moratorium now proposed'.³²⁹ The moratorium, clearly, had become the strategy of choice for the 'conservationist' states - its non-categorical nature making it more attractive to those states reluctant to give up the right to whale.

An interesting description of this influx of new members can be seen in the (written) Opening Statement to IWC 33 by the USSR; which stated that 'there is an increase in the number of countries which now have invaded the IWC having never had any relation either to exploration or to utilization of whale resources. We believe that this process in the Commission is abnormal, and we ought to seriously consider its consequences'.³³⁰ In the political context of the early 1980s it seems unlikely that the word 'invaded' can have been misunderstood! The opposing view can, however, be seen in the words of the Commissioner for St Lucia at the same meeting; with the Commissioner suggesting that '[u]ntil this year, this

³²³ Tanzania Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/TANZANIA.

³²⁴ Sultanate of Oman Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/SOM 1.

³²⁵ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 609-611.

³²⁶ *Ibid* at 609-611.

³²⁷ The proposal had been proposed originally by the UK; and was seconded in plenary by the UK, the US, Sweden, France and New Zealand. It was opposed in debate by Japan, Norway, Spain, Peru, the USSR, and the Republic of Korea. South Africa indicated that, although it had stopped whaling in 1975, it saw no clear scientific basis for a moratorium and that it would, therefore, abstain. IWC 'Chairman's Report of the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) at 17-18.

³²⁸ *Ibid*.

³²⁹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 613.

³³⁰ USSR Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/USSR at 1.

Commission has represented only a small segment of the human family. With the entry of India, China, Dominica, Jamaica, Uruguay and my own country, and the arrival of observers from Kenya, Egypt, Colombia, Costa Rica etc., this Commission has in my view taken a giant step forward in terms of becoming what it should be'.³³¹

In its Opening Statement at IWC 33, Japan showed clearly that it was worried by the joining of so many new members. It stated that '[w]e must stress the rights of the Contracting Governments, as spelled out in the preamble and relevant provisions of the Convention, cannot be denied or challenged merely by a vote at the Commission, which is empowered solely to implement the Convention'; and that '[s]hould such a proposal be carried by virtue of the number of the votes, we would reserve every legitimate right available to us to uphold our cause' and '[t]he consequence of such actions on our part would be entirely the responsibility of the delegations pressing for such a proposal'.³³² At the time, then, Japan was not in favour of allowing the membership of states not directly interested; but, as with so many things in the whaling arena, this attitude would change in time.

A further document, similar to the World Conservation Strategy, was adopted by the United Nations General Assembly in 1982 - the World Charter for Nature.³³³ The Charter sets general principles and requires respect for nature and preservation of its essential processes. There are many principles relevant to whaling, including that ecosystems and marine resources shall be managed to sustain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they co-exist, and that natural resources shall not be utilised in excess of their natural capacity for regeneration. The Charter arguably raises to a global level these basic environmental principles.³³⁴

IWC 34, 1982, turned out to be one of the most significant meetings ever. By now there were 39 members, of whom 37 attended.³³⁵ The increased membership gave the 'conservation-minded' nations sufficient numbers to achieve a successful moratorium vote - 75% being necessary. Appropriately, perhaps, it was the Seychelles which made the proposal that was adopted.³³⁶ The proposal was for a moratorium, achieved by way of a zero quota on all commercially exploited stocks. The term 'commercial' was not, however, defined. Further, the moratorium was made dependent on an undertaking to review the move, after comprehensive assessment, by 1990.³³⁷ Birnie comments that '[t]he last element allowing for future modifications made the proposal more generally acceptable'.³³⁸ Peter Best told the present

³³¹ St Lucia Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/STL at 2.

³³² Japan Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/JAPAN at 1.

³³³ 'World Charter for Nature' United Nations General Assembly Res. A/RES/37/7, 28 October 1982; see <http://www.un.org/documents/ga/res/37/a37r007.htm>. See (n 2165) and (n 2167).

³³⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 599-600.

³³⁵ *Ibid* at 613. The eight new members at IWC 34 (Antigua, Belize, Egypt, Kenya, Monaco, Phillipines, Fed Rep of Germany, Senegal) were all non-whaling states. (Some, like Antigua, Belize and Senegal, appear now, in the 21st Century, generally pro-whaling.) *Ibid* at 613.

³³⁶ *Ibid* at 614.

³³⁷ P Birnie 'The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales' (1985) 12 *Ecology Law Quarterly* 937 at 964-65.

³³⁸ *Ibid* at 964-65.

writer in an interview that this had been an inclusion (in his words, a ‘sop’) designed specifically to bring Spain aboard.³³⁹ At the Meeting, Spain made the point that it did not consider the moratorium as a ‘total ban’ but rather as a ‘temporary interruption of the activity which does not from the part of Spain result from other considerations than those of a need to add very carefully in managing these very important stocks of marine living resources’; which does tally with Best’s contention.³⁴⁰ Doug Butterworth confirmed this, telling the present writer that the moratorium ‘was essentially a deal with Spain’. It was, he said, ‘really, like all these things, a compromise ... the review within ten years, it was all part of the plot because it was a question [of] one vote here or there whether it went through’. If it was merely a ruse, it was one which may yet have serious consequences - according to Butterworth, it was a commitment which ‘countries like the Japanese took [] literally’.³⁴¹

In the lead-up to the 1982 Meeting, the Technical Committee had, by majority vote, put forward a proposal to the IWC which would have the effect of phasing out commercial whaling as a moratorium would commence after two years. In the Commission, after much debate and several amendments, the proposal was voted on; the vote saw 25 in favour, seven against, with five abstentions, and was therefore passed.³⁴² The amendment to the Schedule, as finally adopted, read:

[n]otwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.³⁴³

Something of the heated nature of the matter can perhaps be seen in the recorded words of the (Argentinian) Chairman immediately after the vote was taken: ‘Silence, silence please. I think

³³⁹ *Personal communication* Interview with Peter Best, Cape Town, 8 November 2006; E Couzens.

³⁴⁰ Spain Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 82.

³⁴¹ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens. See (n 447), (n 756), (n 757), (n 758), (n 759), and (n 761).

³⁴² The vote on the moratorium (the zero quota) in 1982 was as follows: in favour, Antigua and Barbuda, Argentina, Australia, Belize, Costa Rica, Denmark, Egypt, France, FR of Germany, India, Kenya, Mexico, Monaco, Netherlands, New Zealand, Oman, St Lucia, St Vincent, Senegal, Seychelles, Spain, Sweden, UK, US, Uruguay; against, Brazil, Iceland, Japan, Rep of Korea, Norway, Peru, USSR; abstentions, Chile, PR of China, Philippines, South Africa, Switzerland. IWC ‘Voting Record at the Thirty-Fourth Annual Meeting’ (1982).

³⁴³ IWC ‘Chairman’s Report of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) at 20-21. In Birnie’s words, the proposal was voted for by:

[t]welve developing states [: Antigua, Belize, Costa Rica, Egypt, India, Kenya, Mexico, Oman, St Lucia, St Vincent, Senegal, and the Seychelles; three - Brazil, Korea, and Peru - voted against; and Chile, the People’s Republic of China, and the Philippines abstained. Switzerland [which abstained], and other states which voted against the ban, believed that zero quotas were already justified on *all* stocks by the ‘scientific findings’ required by the ICRW. ... In contrast to Switzerland, Norway regarded zero quotas in these circumstances as an abrogation of the IWC’s management responsibilities under the ICRW.

P Birnie ‘The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales’ (1985) 12 *Ecology Law Quarterly* 937 at 964-65. Birnie then records that ‘[f]our states - Japan, Norway, Peru and the USSR - lodged formal objections to the amendment’. Jumping ahead a few years, she records that Peru officially withdrew its objection at the thirty-fifth meeting in 1984; and that Japan did ... reach an agreement with the United States allowing Japan to continue to take some minke whales until 1986 in return for a promise to withdraw its objection by then’. *Ibid* at 964-65.

it is not the behaviour of the observers and the representatives here to express the situation in that way. Thank you.’³⁴⁴

Japan argued against the moratorium proposal on the basis that the Scientific Committee had ‘ruled many times in the past that there is no scientific justification or the biological need for a total or blanket moratorium’ and that the moratorium was a political issue; whereas the Convention provides that any regulations should be adopted ‘on the basis of a scientific justification’.³⁴⁵ The Japanese Commissioner then argued that the ‘proposal is clearly in violation of the present Convention’ and that it ‘should be beyond doubt’ that the rights of Contracting Governments, in the ICRW and in other relevant international law, ‘cannot be denied or advocated (*sic*) on the basis of a vote of the IWC’.³⁴⁶ The Norwegian Commissioner argued that he considered the moratorium ‘incompatible with the International Whaling Convention’; the proposal, he suggested, ‘distinguished between one type of whaling which comprises several other types of whaling lumped together under the term commercial whaling and other types of whaling’.³⁴⁷ Iceland argued that ‘adoption of a moratorium on all commercial whaling based on strength of votes but not on scientific findings’ was ‘most certainly contrary to the fundamental objectives and purposes of the Commission’.³⁴⁸ The Republic of Korea agreed, arguing that ‘any proposal which is short of scientific data [] defiles the basis (*sic*) objective of the IWC’.³⁴⁹

Interesting contributions to the debate, particularly given the future stances of Parties, came from countries such as Antigua and Barbuda; which argued that ‘there is a greater consideration than the numbers game my colleagues from Japan would have us believe is truly the issue’, which greater consideration was that ‘[t]here is no humane method of continuing this needless form of industry’.³⁵⁰ St Lucia argued that at the time the Convention was adopted, in 1946, whale stocks were not as depleted as at present, and ‘therefore there were no provisions made at the time for the circumstances with which we are now confronted’.³⁵¹ Ironies abound. Today, these countries appear to be firm backers of Japan’s efforts to resume commercial whaling. Brazil, on the other hand, voted against the moratorium, but is now a firm opponent of resuming commercial whaling.

³⁴⁴ Chairman, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 86.

³⁴⁵ Japan Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 76-77.

³⁴⁶ *Ibid* at 77.

³⁴⁷ Norway Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 79.

³⁴⁸ Iceland Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 79.

³⁴⁹ Republic of Korea Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 83.

³⁵⁰ Antigua and Barbuda Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 78.

³⁵¹ St Lucia Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 78.

3.2.13 Reactions to the moratorium; and attitudes in the ensuing years

Japan, at the end of the Meeting, made a statement in which it expressed its anger over the moratorium proposal being adopted. ‘The global cessation’, according to the statement, ‘of commercial whaling, in itself incompatible with the objectives and purposes of the [ICRW], was proposed without any scientific basis and adopted through the sheer power of votes. This is totally unacceptable to those who share serious concern about the future of the IWC’.³⁵² On many subsequent occasions, Japan has questioned the future of the IWC in similar manner.

On the relationship between the IWC and CITES, questions were raised from the Scientific Committee as to how best to advise CITES on cetacean matters. The SC recommended that it proceed by forwarding to CITES relevant information from its Reports. The IWC approved this procedure. Some members of the SC (in particular, Denmark), however, argued that the ‘questions being asked and the criteria being used by CITES for the listing of organisms’ were quite different from those being used by the IWC in classifying whale stocks; and that, consequently, if meaningful advice were to be given to CITES the SC should provide specific advice in respect of the appropriateness of listing certain species on CITES Appendices.³⁵³ On CITES also, St Lucia argued in Plenary Session that, while it had sympathy for countries engaged in whaling, the IWC represented ‘a very considerable strength of world opinion’. St Lucia suggested that not only the nations present who supported the moratorium proposal, but also ‘many other nations who have joined CITES and proclaim that several species of whales should be completely protected’. ‘This’, according to St Lucia, ‘clearly represents the majority of opinion in the world’ and ‘[t]he nations who currently whale should consider why it is that so many nations who have nothing to gain should want to stop whaling’.³⁵⁴ It is ironic that the worm has so turned that in recent times, in the 21st Century, the argument is made by countries in favour of commercial whaling (including St Lucia) that it is now CITES which represents the great variety of world opinion.

Birnie comments further that ‘the impact of developing countries in the IWC [had been] dramatic. Their participation changed both the nature of the Commission and its mission’.³⁵⁵ Nowadays, the charge is often made that developing countries are ‘pawns’ - but this is to disparage the vital role of pawns. Developing countries may yet play important roles in determining the ultimate fate of the ICRW.³⁵⁶

Birnie suggests that, out of the 1982 Meeting, several problems arose:

[t]he votes against and the abstentions were based on the view that the zero quotas were not fully justified by scientific findings. This issue is the crux of the whole problem. Switzerland, which had been expected to vote in favour, attributed its abstention to this reason. ... The SC had made no recommendations concerning the proposed zero quota although several of its members had commented separately on the proposal. Norway stated that in the absence of any SC recommendation it regarded the zero quotas as an effective abrogation of the IWC’s management responsibilities and deplorable in

³⁵² Statement of the Japanese Delegation, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton).

³⁵³ IWC ‘Chairman’s Report of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) at 37.

³⁵⁴ St Lucia Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 80.

³⁵⁵ P Birnie ‘The Role of Developing Countries in Nudging the International Whaling Commission from Regulating Whaling to Encouraging Nonconsumptive Uses of Whales’ (1985) 12 *Ecology Law Quarterly* 937 at 965.

³⁵⁶ *Ibid* at 970. See 16, generally.

itself. Japan protested that there was neither scientific justification nor biological need for such a ban; the SC report did not establish that a single scientist claimed that this was the only means of conserving whales. In its view the moratorium had become a political issue, ignoring that the ICRW required that amendments be based on scientific findings.³⁵⁷

Of course, in the present thesis, this provokes an important comparison with elephants - neither 'ban' being based scientifically on 'endangered status'.³⁵⁸

Like CITES, the IWC was underfunded. Andresen points out that 'the IWC did not get its own secretariat until 1976, some twenty-five years after it was established. Fees were also largely symbolic, "and the IWC budget was operated out of a cigar box"; there was only enough to cover the costs of meetings and a few publications. This gradually changed when the secretariat was established'.³⁵⁹ By the time the CITES treaty was negotiated, however, negotiators had recognised that far more than a 'symbolic' secretariat was needed if a treaty was to operate properly.

Even with less states actively whaling, and whale take quotas dropping, whale populations remained under threat. According to Day, another problem, 'on top of the overharvesting, was the illegal pirate whaling in the late 1970s'.³⁶⁰ It took time for problems to be recognised and then to be dealt with. Andresen writes that '[a]s inaccurate reporting of catch by some actors was believed to be *one* major reason for the rapid depletion of Antarctic whales, a neutral inspection system was suggested by Norway as early as 1955. However, because of procedural stalling and political opposition, mainly from the USSR, it took *twenty years* to establish an inspection system, and then it was only in a modified form'.³⁶¹

According to Rose and Paleokrassis, '[a] 1974 economic boycott against Soviet and Japanese goods [] was mobilized by 21 national and international environmental groups and was supported by over five million group members worldwide. The boycott attracted a substantial amount of media attention and proved to be very successful in that it led to both the USSR and Japan reducing their quota demands and opposition to conservationist proposals. Greenpeace was also central to the 1993 boycott of Norwegian fisheries products in response to Norway's resumption of commercial whaling that year'.³⁶² More recently, Greenpeace has several times called for an economic boycott against Japanese goods in retaliation for continued Japanese scientific permit whaling.³⁶³ It would be interesting, and instructive, to see whether a boycott

³⁵⁷ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) 615-616.

³⁵⁸ This is something that makes comparison between whales and elephants intriguing. Neither African elephants nor minke whales are numerically on the point of extinction, and this gives proponents of 'conservation' an argument that the species are being protected for reasons other than scientific.

³⁵⁹ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 242.

³⁶⁰ D Day *The Whale War* (2nd ed, 1992) at 35-38.

³⁶¹ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 243-44.

³⁶² G Rose & G Paleokrassis 'Compliance with International Environmental Obligations: A case study of the International Whaling Commission' in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 171.

³⁶³ See Greenpeace's website generally; at <http://www.greenpeace.org/international/campaigns/oceans/whaling>. On a recent campaign effort, see J McCurry 'Greenpeace launches major anti-whaling campaign in Japan' *The Guardian* 9 December 2008 <http://www.guardian.co.uk/world/2008/dec/09/japan-whale-hunting/print> (accessed 9 December 2008).

call would be effective today. The world may well have changed its views and consumers might be less concerned than in the early 1970s with the protection of whales generally. There is a strong argument to be made that it was the consumer boycott in Western countries of ivory products that truly brought the ivory trade to a standstill, and not the CITES Appendix I listing;³⁶⁴ but it may be that there is today a new - and arguably more sophisticated - understanding of the issue.

Komatsu and Misaki write that '[i]n the 1970s, ... the [US] continued at each annual meeting to propose a moratorium for commercial whaling'.³⁶⁵ They then write that '[1982] saw a dramatic increase in the number of IWC member countries, from 14 to 39. During this decade, whaling nations such as [the] Republic of Korea were recruited to join the IWC. They joined on the advice of the world's Superpower, but were stuck with a reduction of quota, sometimes to zero depending upon the stock. There were also new recruits from the small island nations of the Caribbean, which had their annual fees paid by anti-whaling organizations'.³⁶⁶ This charge is of course extremely ironic, given that Japan had already been charged with exactly this conduct - having allegedly brought Brazil in in the 1974-5 whaling season to vote in line with Japan³⁶⁷ - and given that Japan is today accused regularly of bringing in small nations to vote as it dictates. In irony upon irony, in fact, it is now largely the small Caribbean states who support Japan. Where the 'blame' lies for this tactic is probably impossible to determine. It might even be impossible to determine whether it was 'pro-' or 'anti-whaling' states which first adopted the tactic. (Probably, it does not matter.) It seems that at different times both sides have resorted to the tactic in order to win support for their arguments - and crucial votes. Hypocrisy is not the preserve of single protagonists in international environmental law and negotiation. What else does this tell us about international law and negotiation? Perhaps that it is - at least in good part - about learning ways to manipulate.

By the late 1970s the tide of public opinion had turned - perhaps irrevocably - within many former whaling nations. M'Gonigle writes that '[b]y 1976, all Antarctic fin whales were finally protected, and quotas had been established for all other whales exploited by IWC members. ... [But] ... whaling occurring outside the auspices of the Whaling Commission showed no sign of abating, ... [m]any of the products of this whaling activity were finding their way into Japan'.³⁶⁸ Day tells us that '[b]y the end of 1977, although the whaling nations were unrepentant in their whaling policies, the tide of public opinion was massively against them';³⁶⁹ and that 'in ... 1977 ... Australia was the last English-language nation in the world to maintain a commercial whaling industry, ...' which it ended in 1978.³⁷⁰ Pressure was brought to bear upon a number of nations still involved in whaling - but not all were eager to give up whaling, or even pirate whaling.³⁷¹ Whaling ban proponents likewise found it difficult, sometimes, even to persuade those countries ostensibly against whaling to act. Rose and

³⁶⁴ See (n 1181).

³⁶⁵ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 88-89.

³⁶⁶ *Ibid* at 89-90.

³⁶⁷ See (n 210).

³⁶⁸ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 148.

³⁶⁹ D Day *The Whale War* (2nd ed, 1992) at 27.

³⁷⁰ *Ibid* at 29.

³⁷¹ See, for instance, *ibid* at 86.

Paleokrassis write of ‘the US’ increasing reluctance to use or threaten [] measures against nations who breach IWC regulations or whose proposals for research whaling have been rejected by the IWC ... What has tended to occur is that sanctions are threatened but subsequent negotiations result either in reduced action or none at all. ... Similarly, on the occasions when sanctions have been applied, their effect has often been negligible’.³⁷² They suggest that, despite the successes which ‘the US has achieved in promoting adherence to and compliance with the ICRW through threatening economic sanctions’, the country is wary of taking action which might damage its national interests; and that ‘[t]here are limitations to what an individual state can do or is willing to try to achieve for the promotion of a common good’.³⁷³

These suggestions are significant. States have (sometimes conflicting) domestic constituencies they must satisfy, and while trying always to act to their overall best advantage, there is little room for altruism. US reluctance to follow through with its threats meant, per Vogler, that ‘[the scientific whaling loophole] was to be exploited on a huge scale by the USSR and to a lesser extent by the Japanese’.³⁷⁴ To a large extent, then, the IWC remained an ‘old boys’ club’ through the 1970s and even into the mid-1980s. Rose and Paleokrassis suggest that ‘[i]t is clear that sanctions have been central as non-compliance responses in regimes for the cooperative management of common marine resources ... [t]he sanctions applied have been trade restrictions and fisheries access restrictions’; but they go on to warn that ‘... [r]estricting fisheries access is possible only in circumstances where states responding to breach of the management regime are in a position physically to control the access of another state’s vessels to the responding state’s fishing waters’.³⁷⁵

As early as 1978, accusations were made of undue Japanese pressure on other ICRW members. M’Gonigle writes that ‘in 1978 [] the moratorium [] had been put on the agenda by Panama, whose Commissioner, Mr J P Fortom-Gouin, was among the most outspoken of whale conservationists. ... Before the meeting [] began, Panama dismissed [him], and on the first morning of the session Panama withdrew the item from the agenda. The conservationists’ newspaper, *ECO*, accused the Japanese government of applying economic pressure to Panama by threatening to cancel a ten million dollar sugar purchase’.³⁷⁶ While the truth of this cannot be known, accusations that this sort of pressure is a tactic used by Japan have been made at least from the late 1970s until the present day. Of course, the forms of pressure put on ‘allies’ by the anti-whaling countries might be no more morally righteous.³⁷⁷

By the end of the 1970s, writes Birnie, ‘it was apparent that attempts to revise the ICRW, were from the point of view of conservationist states and non-governmental groups, likely to set-

³⁷² G Rose & G Paleokrassis ‘Compliance with International Environmental Obligations: A case study of the International Whaling Commission’ in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 170. See 8.4 and 16.

³⁷³ *Ibid* at 170.

³⁷⁴ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 53.

³⁷⁵ G Rose & G Paleokrassis ‘Compliance with International Environmental Obligations: A case study of the International Whaling Commission’ in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 171.

³⁷⁶ R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 160-161.

³⁷⁷ See 16; esp. the opinions of De Sombre.

back rather than advance the progress towards better and more extensive international control of the conservation of cetaceans, despite the changing international perspectives on the uses of such species'. She suggests in particular that the expanding membership of the IWC 'tended to exacerbate the difficulties by extending the points of view' - a danger inherent in the recruitment of states with their own interests to protect.³⁷⁸

It does appear that in the early 1980s the whaling nations were on the back foot. Birnie's general assessment is that there was more pressure put on whaling states as 'more states adopted stricter national laws, more participated in the new international conservation treaties, more (especially non-whaling states) joined the IWC, the EEC adopted binding regional measures and NGOs activated an intensive campaign to ban whaling for the time being'.³⁷⁹ This led, she suggests, to 'dramatic changes in IWC practice: by incremental adoption of more conservatory measures the IWC slowly moved closer towards protecting depleted whale populations rather than sustaining the industry at the expense of the whales'.³⁸⁰

3.2.14 Terminology: the word 'moratorium'

Technically, it is not correct to use the word 'moratorium' to refer to the provision of a 'zero quota on catch limits' in s10(e) of the Schedule to the ICRW. While 'moratorium' is clearly more correct than the word 'ban' - as often popularly used - it is not as accurate as would be 'zero quota'. Nevertheless, the word 'moratorium' has been so used - including by IWC members themselves - that it is certainly the most accepted term today. This usage is supported by Sand,³⁸¹ *inter alia*.

3.2.15 IWC 35, 1983

IWC 35, 1983, saw two new members join: Mauritius and Finland. Finland, in its opening statement, said that it supported the 'coming moratorium on commercial whaling' - but that it did regard whales as living resources, per the World Conservation Strategy; and that it regarded whales as 'shared international resources' requiring international cooperation for their conservation.³⁸² According to Esko Jaakola, long-serving IWC Commissioner for Finland, Finland joined originally in order to support the moratorium - Jaakola told the present writer that Finland had been under pressure from Greenpeace. Perhaps a little flippantly, Jaakola said that it had seemed that the Greenpeace representative would not go away until Finland joined.³⁸³

Although Dominica's membership had lapsed; there were by now 40 members - 35 of which were represented at this meeting. The next battle became to persuade those states that had

³⁷⁸ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 569.

³⁷⁹ *Ibid* at 575. The EEC (European Economic Community) being the precursor to today's European Union (EU).

³⁸⁰ *Ibid* at 575.

³⁸¹ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 56, fn 1.

³⁸² P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 624-625.

³⁸³ *Personal communication* Interview with Esko Jaakola, Helsinki, 19 April 2007; E Couzens.

lodged objections to the zero quota (the moratorium) to withdraw these objections.³⁸⁴ Japan, Norway, Peru and the USSR had lodged objections - other whaling states (Brazil, Chile, Iceland, Korea (PR) and Spain) had not, probably because of the IWC's commitment to review by 1990. The US was putting pressure on, particularly, Norway (under the Pelly Amendment, which would restrict Norwegian fishing industry exports to the United States) because of Norway's objection to the zero quota and its objection to the abandonment of the use of cold harpoons, and Japan. The US targeted Japan under the Packwood-Magnuson Amendment,³⁸⁵ threatening to prevent Japan from catching the 100 000 tonnes of fish previously allocated to it by agreement in the US' 200-nautical mile zone.³⁸⁶

3.2.16 *New arguments by the whaling states*

This Meeting saw a new argument put forward by both Japan and Norway, however. This was to the effect that both countries had coastal communities in remote regions, to whom whaling was both a vital economic interest and so rooted in history and culture that it was arguably a new form of subsistence whaling - although distinct from the aboriginal subsistence whaling already permitted under the ICRW (in terms of the Schedule).³⁸⁷ This is an argument that is still being made, and which has not yet been accepted by anti-whaling IWC members, in the 21st Century.

The United States was putting pressure on members it saw as recalcitrant - but, at the same time, all was politics and the US showed also a reluctance to follow through with its threats, this reluctance verging even on hypocrisy. This charge comes through in Day's words, when he tells us that 'Japan had for years used the IWC as a defence against the United Nations' call for a moratorium'; but that 'when in 1982 the IWC also called for an end to whaling by 1986, Japan switched tack again', saying it 'saw no legal or moral obligation to accept any decision of the commission on such a proposed moratorium'. This defiance would not have been possible, alleges Day, 'in the face of the drastic sanctions of the Packwood-Magnusson Amendment, but the American administration once more betrayed its avowedly conservationist stand'.³⁸⁸ The effect of this was that all of Iceland, Japan, Korea and Norway continued to hunt whales - the latter two countries under guise of the 'scientific research' exemption, and Norway under its objection. 'Bizarrely enough', comments Day, 'for the first year of the moratorium zero quota in 1985-86, the whaling nations killed more whales (7 217) than was permitted the year before (6 623). In 1986-87, another 6 361 were killed under objection or scientific permit, despite the official position of a zero quota'.³⁸⁹ Day blames this

³⁸⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 624-625. Birnie advises that '[f]ive of the now [40] members were not represented at this meeting (Jamaica, Kenya, Mauritius, South Africa, Uruguay)'; and that '[t]he efforts of conservationist states were directed to encouraging the objectors to remove their objections'. *Ibid* at 624-625. The present writer has not been able to establish why it was that South Africa was apparently not represented.

³⁸⁵ See 8.4.

³⁸⁶ *Ibid* at 625-627.

³⁸⁷ *Ibid* at 625-627. See 10.1.2, 10.1.3, 10.4, 14.1.2 and 14.1.4.

³⁸⁸ D Day *The Whale War* (2nd ed, 1992) at 157. Day alleges that '[i]ndependent of the IWC, in December 1984 the Reagan administration, in defiance of its own legislation, came out of secret meetings with the Japanese. A two-way deal would allow the Japanese to continue commercial whaling (even of protected sperm whales) until 1988. Clearly, the Reagan administration was using the whales as a bargaining chip for its trade negotiations with Japan and to ensure further support for its own non-commercial Eskimo hunt'. *Ibid* at 157. See 8.4 and (n 437).

³⁸⁹ *Ibid* at 158-60.

largely on Japanese economic power; writing that it is this power that enables Japan to continue whaling, even though '[s]ince the UN vote in 1972, *every* international body and treaty that has any bearing whatever on whales has ruled that commercial whaling *must* stop. *All* are ignored by the whalers because no one will enforce such rulings'.³⁹⁰

Japan's economic might makes it a formidable opponent; even as this very economic might is what makes it so important a protagonist in the environmental debate.

The philosophical battle was not won in the 1980s, as overwhelming as seemed to be the support for the preservation of the whale - and its 'iconisation' as a symbol. Vogler writes that '[t]he prohibitionist view seemed in the mid-1980s to have majority support in the IWC, but was bitterly contested by the few remaining whaling nations, notably Norway, Japan and Iceland'. He adds that '[n]o less than Gro Harlem Brundtland joined the contest in support of a resumption of catches by the whaling communities of northern Norway'; and quotes her as saying that '[w]e have to base resource management on science and knowledge, not on myths that some specifically designated animals are different and should not be hunted regardless of the ecological justification for doing so. International cooperation is in danger if this kind of selective animal welfare consideration is allowed to dictate resource policies'.³⁹¹

The ICRW is open for all states to join - it is not restricted to whaling nations, hence the membership of states such as Austria and Switzerland and, in more recent times, Mongolia and Israel. de Klemm suggests that '[i]n consequence, the [IWC] has gradually been transformed from a commercial exploitation treaty into a conservation [ie: 'preservation'] treaty. ...[the] provision [of unrestricted access] does appear to have been included deliberately, as the Preamble states that signatories recognise "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks" ...'.³⁹² The assertion that the ICRW *has* been so transformed is debatable, as will be seen.

3.2.17 *The nature of the dispute*

According to M'Gonigle the basis of the regulation of whaling 'is a configuration of economic and political power'. The issue that has been 'at the heart of the history of the IWC', he explains, 'is the need to redress at a structural level the imbalance between economic and environmental considerations in decision[-]making. At the international level, a restructuring of the IWC is desirable. But such a development will not take place unless basic changes first occur within states'.³⁹³ M'Gonigle then suggests that the study of the law and politics of whale conservation requires discussion of a wider issue, the 'integration of human economic and political systems in a limited global environment'; and that as 'the limits of expansion and

³⁹⁰ *Ibid* at 167-68.

³⁹¹ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 51. Gro Harlem Brundtland is the former Prime Minister of Norway. She is also a well-respected environmental figure, having been involved with the development of international environmental law at, for instance, the UNCHE of 1972, the UNCED of 1992 and the WSSD of 2002. She was also the Chair of the WCED of 1987, also known as the 'Brundtland Commission'.

³⁹² C de Klemm & C Shine *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* IUCN Environmental Policy and Law Paper No. 29 (1993) at 48.

³⁹³ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 202-203.

overexploitation press ever more strongly, the tendency is to become even more ruthless in the quest for economic security'.³⁹⁴

Vogler tells us that the way in which the IWC is configured is 'important because there is a majority voting rule and a requirement for three-quarters of the members present and voting to approve changes to the "Schedule" containing the operative rules of the regime (Art. III). Nor is there any 'activity' criterion (as may be found in the closely related regime for Antarctic Marine Living Resources) making practical or scientific involvement with whale industries, whether hunting or watching, the basis of membership'.³⁹⁵ This means that the majority held (at present, perhaps, by a small minority) by the pro-whaling States is not sufficient to overturn the moratorium on commercial whaling. No wonder, then, that states might try - as will be seen later in this thesis - to take whaling-related decisions to CITES where the majority needed is only 66% and more support might be available.

According to Andresen, '[t]he present trend is toward increased participation by states, as well as nonstate actors, in international regimes. Generally, this trend is welcomed by analysts and policy makers as a step toward a more dense "world community". The IWC was designed as an open organization from the outset'.³⁹⁶ 'The crafters', he continues, 'of the convention did not know much about environmental organizations, but the increasing presence of such organizations has had a significant impact on the whaling regime'. He argues that within the IWC NGOs are so well represented in the delegations of key nations that they exercise a disproportionate influence; thereby representing 'a rare case in which NGOs, usually conceived of as the "underdogs," are allied with the most powerful players'. His conclusion is that it is arguable that this NGO influence has been less than constructive as they may have turned the issue 'into a simple battle of whaling versus nonwhaling'.³⁹⁷

This is an important point, but Andresen may have over-simplified it. The issue is often framed as a 'simple battle', but it is far more complex than this. The presence of NGOs means, also, that the whaling battleground is an arena where states can gain kudos without losing much that they really care about - the accusation has been made in respect of France, for example.³⁹⁸

Andresen then makes an intriguing claim. He argues that the time may have come for 'environmentalists to realize that *they have won the battle to save the whales*'. The whaling issue, he suggests, was 'an excellent first target for the young international environmental movement in the early 1970s; the whaling industry had diminished greatly and was therefore very weak, the problem was easy to visualize, and massive failure to conserve the largest animals on earth could be easily demonstrated'. In the 1990s, however, 'when *sustainability* is the key word among environmentalists', he concludes that 'in *rational* terms it is difficult to

³⁹⁴ *Ibid* at 231.

³⁹⁵ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 51-52.

³⁹⁶ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 240-41.

³⁹⁷ *Ibid* at 241.

³⁹⁸ See (n 450) and (n 2064).

understand the massive opposition toward carefully managed harvesting of species that are clearly *not* threatened'.³⁹⁹

A former Secretary of the IWC, Ray Gambell, supports this, by arguing that anti-whaling groups have been forced of late to shift their justification for being opposed to whaling; with more emphasis being placed 'on the methods of killing whales and the length of time that elapsed before a whale died from harpooning' and with the 'ethics of the pain and suffering inflicted on hunted whales also bec[oming] an issue for consideration in conservation policy'.⁴⁰⁰ Iino and Goodman claim that '[t]he "Save the Whale" slogan that continues to raise hundreds of millions of dollars for anti-whaling organizations is now irrelevant. With the exception of perhaps the north Atlantic right whale that is subject to mortality from ship strikes and entanglement in fishing gear, whales have been saved'.⁴⁰¹ Certainly, it might be true that framing the debate as a simple fight to save endangered whales is disingenuous, or at least an over-simplification - and perhaps even owes more than it should to the ease of using the whale as a symbol to raise money - ; but what this gives too little credit to is the possibility that it is important to the environmental cause to retain the whale *as* a symbol. After all, it is the pro-whaling camp which appears nowadays to have cornered the market on the 'ecosystem' approach to conservation in its arguments for the resumption of whaling. Put another way, the battleground may have shifted somewhat - but the whale remains an important symbol, like the banner to which the legions of an army rally wherever the battlefield might shift to.

Burke, attempting to explain the context of the resumption of commercial whaling, points out that the current international legal regime regarding marine mammals 'consists of customary principles and the provisions of relevant international agreements, including the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the ICRW, and other particular agreements'. Under customary law, he tells us, the 'nationals of all states are free to exploit all living marine resources, including whales, outside national jurisdiction, where flag states of these nationals are obligated to prescribe conservation measures for these operations and to cooperate for this purpose'.⁴⁰² Not only the principles of UNCLOS are being argued for here, of course; but also the principles of the *Bering Sea Fur Seals Arbitration*.⁴⁰³

3.2.18 The purpose of the ICRW

When Canada withdrew from the IWC in 1981, it gave as its reason for doing so the argument that the ICRW was intended to 'provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'; and that since the Canadian Government had, in 1972, banned commercial whaling it no longer had 'any direct interest in

³⁹⁹ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 249-50.

⁴⁰⁰ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 76-77.

⁴⁰¹ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 11.

⁴⁰² W T Burke 'A New Whaling Agreement and International Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 52.

⁴⁰³ See Annex D.2 on UNCLOS; and 2.3 on the *Bering Sea Fur Seals Arbitration*.

the whaling industry or in the related activities of the IWC'. This implies clearly that Canada did not believe that the purpose of the ICRW was separable from commercial whaling.⁴⁰⁴

Many commentators agree. Jacobson argues, for instance, that 'an evolutionary change in custom favouring protection of whales from whalers, if such a change is indeed on the horizon, should not as easily be seen as automatically amending the treaty'.⁴⁰⁵ His argument is that the 'Vienna Convention's strong emphasis on the ordinary meaning of a treaty's language is not helpful to those who wish to qualify the ICRW as a whale preservation agreement'; and that 'analysis of the whaling convention's language setting forth its purposes and objectives, especially when viewed in light of its context, reveals that it is among the clearest wording of any international agreement'. Scornfully, he suggests that 'it has required some linguistic gymnastics from those analysts who have attempted to manipulate this wording to justify the IWC's actions in purporting to establish a Southern Ocean sanctuary and an indefinite moratorium on commercial whaling'. In particular, he explains that such verbal gymnasts have focused on the word 'conservation' (in the sense of 'preservation,' obviously) in the wording of the Convention; but simultaneously have ignored the 'other principal part of the formula that very clearly establishes whale harvests as the ultimate objective, as if the IWC has been given an option to choose between them'. He concludes that the ICRW's 'frequent references to its purposes and objectives, taken collectively, easily support a plain-meaning reading that identifies the conservation goal as a *means* of achieving the more important sustainable-whaling *end*'.⁴⁰⁶ Jacobson does not appear to allow, however, for the possibility that a purpose might indeed change.

Lyster argues that change is possible; but cautions that this is allowed only when 'the ordinary meaning of the text is ambiguous or obscure or when the ordinary meaning of the text' leads to a result 'which is manifestly absurd or unreasonable'. He concludes that 'an interpretation which fulfils, rather than frustrates, the objectives of the treaty should be preferred if there is any ambiguity'.⁴⁰⁷

Paradoxically, a little *more* ambiguity in the ICRW might not have been a bad thing if it had led to more flexibility. That the treaty is definite in its terms has arguably contributed to the current polarisation within its membership - there is little room for compromise where only one of two competing interpretations can be correct. Of course, though, one must remember that Birnie has argued - quoted above and below - that it *is* a flexible treaty.⁴⁰⁸ Arguably, however, she was writing at a time when - the 1982 moratorium having just come into force in (1985/6) - it appeared that the treaty had been adapted. In more recent years, the impasse between camps in the IWC appears set in stone.

⁴⁰⁴ 'Communiqué 26 June 1981', Department of External Affairs, Canada, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/CAN. See (n 311) and (n 317).

⁴⁰⁵ J L Jacobson 'Whales, the IWC, and the Rule of Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 86.

⁴⁰⁶ *Ibid* at 87-88.

⁴⁰⁷ S Lyster *International Wildlife Law* (1985) at 7-8.

⁴⁰⁸ See (n 144), (n 151), (n 223), (n 424), (n 813) and (n 873).

Iino and Goodman write that ‘the ICRW was one of the first resource management conventions to embody what is now referred to as the principle of sustainable use’.⁴⁰⁹ However, they contend, it is ‘dysfunctional because the majority of its members no longer support the purpose of the Convention, its decisions are made on the basis of emotional and moral judgments rather than scientific evidence, and it is becoming increasingly irrelevant since most whaling, even that conducted by IWC members, occurs outside of its control’.⁴¹⁰ This last contention, for which the writers offer no evidence, seems highly unlikely - unless it is the annual takes of small cetaceans by Japan that is being referred to.⁴¹¹

Vogler notes that ‘[a]t the international level the attempt to bring open access fisheries under some form of CPR regime has long posed problems’.⁴¹² This simply reflects the generalised difficulty of dealing with a resource open to exploitation by all - the whaling situation is further complicated by its history, symbolism, emotion, and by both altruism and self-interest.

Friedheim praises the text of the ICRW; going so far as to describe it as being, despite its age and the fact that it is one of the oldest international environmental instruments, ‘remarkably prescient and “Brundtland”-like in its attempt to define its goal’. He suggests that the ICRW takes an approach of ‘establishing trip wires for permitted levels of exploitation’ and contends that this approach is ‘fundamental to all wildlife management including the risk-averse Revised Management Procedure developed by the IWC Scientific Committee’.⁴¹³

In other words, the ICRW, claims Friedheim, incorporates the precautionary principle into cetacean management - although the ‘prescience’ he claims might be as much a later incorporation, certainly in its explicit formulation. That such an approach is necessary can hardly be in doubt. As Birnie puts it, ‘the conservation of cetaceans [] presents more complex problems of regulation and management that hitherto envisaged. Advances in many modern technologies, accompanied by acceleration in economic development to meet human needs, are accelerating the degradation of many marine ecosystems and the cetacean habitats they sustain’.⁴¹⁴ This implies also that it is important that the whaling debate needs to be resolved, for reasons of increased understanding of biological diversity.

Jacobson acknowledges that ‘international agreements that serve as charters or constitutions for regulating bodies can and should be interpreted flexibly as their work and its context evolve over time’.⁴¹⁵ He argues, however, that ‘of course, there must be limits to such flexibility, and the limits must be found in the objectives and purposes of the organizations that the agreements create’; otherwise, there is a danger that ‘they become anything the majority or politically powerful members want them to become, a clearly unacceptable

⁴⁰⁹ Y Iino & D Goodman ‘Japan’s Position in the International Whaling Commission’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 4.

⁴¹⁰ *Ibid* at 5-6.

⁴¹¹ See 2.4.5, (n 1678) and (n 1796).

⁴¹² J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 48-49.

⁴¹³ R L Friedheim ‘The IWC as a Contested Regime’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 20-21. See 8.1.2 and 8.1.3.

⁴¹⁴ P Birnie ‘The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 103-04.

⁴¹⁵ J L Jacobson ‘Whales, the IWC, and the Rule of Law’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 91-94.

philosophy'. He concedes that there always will be dissents; but argues that 'reinterpretations that ignore or counter the instrument's objectives and purposes are not acceptable adjustments but are instead violations'.⁴¹⁶ The IWC, he continues:

is certainly the sort of international organization or body established to make regulatory decisions over time in changing circumstances, and thus the ICRW, or at least that part that creates the IWC and provides that body's powers, is the type of treaty the Vienna Convention and the ICJ refer to as a 'constituent instrument' or constitution. And it follows that the ICRW's provisions setting out the powers of the IWC can and should be interpreted flexibly in an evolutionary manner. Indeed, those who defend the IWC's recent actions have made this point. But even they must recognize that there are limits on the flexibility of such interpretations. At a minimum, it should be obvious that any action that runs counter to the ICRW's clearly stated purposes for creation of the IWC can and should be considered *ultra vires*. Moreover, any IWC action that purports to operate in an arena beyond its clearly circumscribed authority would not take effect. ... The IWC's action is *ultra vires* and thus should be of no effect at all. A good case can therefore be made for the proposition that the Southern Ocean sanctuary simply does not exist. It can and perhaps should be ignored. Similarly, a permanent moratorium on commercial whaling would certainly be *ultra vires*.⁴¹⁷

This clearly borders on the nonsensical, to be blunt. Where Jacobson argues that the IWC's actions are *ultra vires* and therefore not binding, he ignores the fact that the IWC has acted properly in its voting and administrative procedures. When he says that certain actions of the IWC 'should be ignored' this is merely wishful thinking. Further, Jacobson's view of the causes of the gridlock within the IWC is only one view of the such causes - there are opposing views.

Without a dispute settlement mechanism being provided for in the treaty, is there a way to decide which legal interpretation is the correct one? Could the International Court of Justice, or perhaps its environmental chamber, make a decision? This is highly unlikely to happen. It is also unlikely that the Law of the Sea Tribunal will ever be used to fulfil this function, as will be discussed later.⁴¹⁸

Jacobson does, however, then ask the question whether 'there [is] such a thing as the rule of law in the international community?'. 'My own answer', he continues, 'is that, even if international law is not really law, nearly every nation-state conducts its international relations

⁴¹⁶ *Ibid* at 91-94.

⁴¹⁷ *Ibid* at 94-95.

⁴¹⁸ In January 2008 the Federal Court of Australia ruled that a Japanese whaling company (Kyodo Senpaku Kaisha Ltd) had broken environmental laws (had acted in contravention of the Australian Environment Protection and Biodiversity Conservation Act) and ordered that it cease killing whales in Australia's Antarctic whale sanctuary. The matter had begun in 2004, brought by the NGO Humane Society International; in 2005 the Australian government had intervened, argued that the matter of whaling was best left to governments, and the matter was 'derailed' (what happened was that when HSI applied for the leave of the Federal Court to proceed against a company outside Australia, the Commonwealth Attorney General submitted that allowing the case to proceed would cause a diplomatic incident). In 2006, however, the Federal Court (on appeal to a Full Bench) ordered that proceedings could resume. The judgment is not effective outside of Australian waters; but the Australian government has several times mouthed the possibility of an international court case. See 'Australia court orders end to Japanese whaling' *Reuters* 15 January 2008, <http://www.reuters.com/article/latestCrisis/idUSSYD7828>; see also 'Govt 'should enforce' whaling injunction' *ABCNews* 15 January 2008, <http://www.abc.net.au/news/stories/2008/01/15/2139132.htm>. See also 'Japanese Whaling Case' *Environmental Law Publishing*, <http://www.envlaw.com.au/whale.html>. There is another reason why it is unlikely that Australia will seek enforcement of its desires in an international forum - which is the danger that it might lead to consideration, and even rejection, of Australia's claim to owning waters around Antarctica. I am indebted to Rosemary Rayfuse, Professor, Faculty of Law, University of New South Wales, (personal communication, March 2008) and Ewan McIvor, Senior Environmental Officer, Australian Antarctic Division, (personal communication, July 2008) on this point. See (n 627), (n 2466) and (n 2512).

as if it is, ...'.⁴¹⁹ 'It is [] unfortunate', he adds, 'that the [US] has been a leader in the IWC coup that is ignoring the clear mandates of the ICRW. Without US support and economic power, the anti-whaling states that have packed the IWC would probably not have been nearly as successful as they have been in getting away with their violation of the limitations of the IWC's authority'.⁴²⁰

Perhaps what he does not give enough credit for here is the *realpolitik* of international law. Every state *does* try to get whatever it wants, and is loath to be bound by international law (or indeed any infringement on its sovereignty) but is unwilling also to be seen to be in breach of international law - and this goes also for the US. While it might attempt to use its muscle to get the result it wants, the US will never do so without trying at the same time to justify itself in the terms of international law. And this will, to some extent at least, restrain the most powerful state - at times, it will be compelled to negotiate in good faith, and to yield in certain areas to get what it wants in others. Jacobson ignores also the fact that, while the anti-whaling States may have been 'getting away with violations', the pro-whaling states have likewise been getting much of what they want - as is discussed later.⁴²¹

3.2.19 *Conflicting opinions on the ICRW*

Andresen suggests, optimistically, that '[r]ecently the IWC has stood forth as an institutionally rather advanced regime, much in line with the call for transparency, accountability, a solid knowledge base, advanced enforcement procedures, and even extensive use of majority voting'.⁴²² This comment overlooks the elements of self-interest which seem to have become so entrenched within the IWC; as well as both the deadlock between members and the potential abuse of the 'majority voting' mentioned.

Andresen describes the ICRW also as having an 'inherent flexibility'.⁴²³ The description of the ICRW as being 'inherently flexible' might be a little startling to some commentators and parties, despite Birnie's views as already canvassed.⁴²⁴ Perhaps what Andresen means, however, is simply that it is possible to change the ICRW without the need for changing its actual provisions. This would, however, imply that it is possible for the ICRW to have become a 'preservation-oriented' treaty, which is unlikely to be the point that Andresen wants to make. In other words, the treaty itself would not seem to be particularly flexible - unless one argues that it *has* changed as its members' interests have changed.

3.2.20 *Conflicting opinions, continued*

As flexible as the ICRW itself might arguably be, it soon became apparent that its parties were not easily going to show similar flexibility. According to Gambell, '[b]y the early 1980s the Scientific Committee found it almost impossible to reach agreement on the classification of

⁴¹⁹ J L Jacobson 'Whales, the IWC, and the Rule of Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 95-96.

⁴²⁰ *Ibid* at 97-98

⁴²¹ See 3.4.7.

⁴²² S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 244.

⁴²³ *Ibid* at 244.

⁴²⁴ See (n 144), (n 151), (n 223), (n 408), (n 813) and (n 873).

catch limits for stocks subject to commercial whaling, other than for those needing complete protection. ... these ['anti-whaling lobby'] interest groups pursued a policy in the IWC of methodical restrictions on commercial whaling activities'.⁴²⁵ Ironically, this suggestion of 'methodical restrictions' echoes the Japanese policy in the last decade of pushing for every advantage possible.

The present writer has put the issue of the ICRW's purpose to a number of people who are, or have been, involved in the debate.

Asked for his view of the purpose of the IWC, past and present, Herman Oosthuizen suggested that this is 'basically the whole debate'; and that there are two ideologies - one view led by Japan - seeing the ICRW as being clearly for consumption, with 'biologists' thinking that it should be more for 'conservation dealing with whales'. Both groups, he said, are currently trying to make use of the treaty as it stands; but that it is 'full of loopholes' and 'too old now at the moment'.⁴²⁶

When it was put to Horst Kleinschmidt that that ICRW clearly began with a utilitarian goal, and that to argue otherwise would be to give too much credit for foresight to the Parties in 1946 when conservation was not a major issue; he answered 'correct, that's absolutely right ... and which side of the debate you stand on informs what you think the purpose of the ICRW is ... obviously many argue that it's [as it was in 1946] and they remind the IWC every year of that as the purpose'. His own view, he then explained, was that the IWC 'is an inappropriate instrument in the 21st Century to deal with any form of management of species in the oceans and that it really needs an overhaul'. Asked whether he thought that there are problems with the treaty itself, he said that he believes the treaty to be out of date and to 'reflect a moment in time ... where a small group of nations got together because either they were directly or indirectly involved in whaling'.⁴²⁷

Peter Best suggested to the writer, that the treaty has a 'grey area' where it is not clear whether conservation is its aim - and that it is a 'weakness' that conservation has not been better defined.⁴²⁸ Butterworth said that different countries have different perceptions and that the Japanese are extremely literal in their interpretation; whilst other countries say that the law should evolve. He felt, however, that if conservation includes sustainable use, then it is inherently present; as you cannot have 'orderly development of the whaling industry unless' there is conservation of the animals at the same time, meaning that there is 'really no fundamental conflict there - it's political'.⁴²⁹ He then gave an interesting interpretation of the problem, suggesting that renegotiation of the treaty would be a 'non-starter'. His argument for this being as follows: 'I think I'm correct in saying that the fundamental reasons for this in international law are that an earlier treaty overrides a later treaty,⁴³⁰ and, in this sense, the IWC

⁴²⁵ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 69.

⁴²⁶ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

⁴²⁷ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

⁴²⁸ *Personal communication* Interview with Peter Best, Cape Town, 8 November 2006; E Couzens.

⁴²⁹ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

⁴³⁰ This is possible, but not correct as a general principle. Where parties are common to both, the earlier treaty will normally apply only to the extent that its provisions are consistent with the later treaty (Art 30(3) of the 1969 Vienna Convention on the Law of Treaties, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf); but a more specialised

is not subject to UNCLOS which subsequent treaties are'. If UNCLOS, he explained, gave states rights within their 200-nautical mile zones, the IWC predated that and gave the Commission rights within those 200 miles; and that 'the moment anything comes up about renegotiating the Convention, a large number of states say a prerequisite is that rights within 200 mile zones now become our rights'. The effect of that would be to remove a large number of whaling operations from within the Commission's control, leaving only 'a number of other weaker conventions - like the Fish Stocks Agreement'. From this point of view, he felt, it is better to keep the treaty as it is than to 'fiddle around with it' and have the 200 mile zone issue arise - this, together with the issue of small cetaceans, being, in his view, the two big issues.⁴³¹

Interviewed by the present writer, the Head of Science at the International Whaling Commission, Greg Donovan, said that he felt that the nature of the ICRW had not changed; and that it was not the Convention itself that is problematic. Whether there are any problems indeed, in his view, depends on the observer's standpoint. 'A tricky question', he called it.⁴³² Asked a similar question; and, in particular, whether the Berlin Initiative of 2003 (which saw the creation of the IWC's Conservation Committee)⁴³³ had changed the ICRW's purpose, the Secretary to the IWC, Nicky Grandy, said that the purpose as set down in the Convention itself had clearly not changed. 'But', she added, 'what it means to different countries has probably changed over time'. In regard to the Conservation Committee, she said 'we were doing lots of conservation work anyway, we just didn't have a committee, and the Conservation Committee hasn't really changed that'.⁴³⁴

3.2.21 *Politics*

In 1982 the IWC set the 'moratorium' on commercial whaling in place, by dint of setting a nil quota for the total allowable catch. This amendment came into force in February 1983 and the moratorium from 1986. The moratorium was extended in 1990 and has been extended - or at least not removed (which removal would require a 75% vote) - at every meeting since then.

The same whale species have, likewise, been listed by CITES on Appendix I. An important question is whether stocks of minke whales should have been listed in Appendix I in the first place. This decision, which was apparently made at the 1983 COP, came in spite of the fact that, apparently, the CITES Secretariat, the US, the European Community, and Switzerland all 'held the view that the criteria had not been met'.⁴³⁵ This is a very interesting point; given that the USA and the EU are now firmly opposed to whaling - Switzerland remains ambiguous, but seems generally supportive of the anti-whaling view.

The politics surrounding the obtaining by the anti-whaling faction of the 1982 moratorium, and its eventual coming into force, are extremely convoluted, and will undoubtedly never be

treaty (*lex specialis*) might be considered to trump a generalised treaty (*lex generalis*). See Annex D.2.3, (n 2440) and (n 2488).

⁴³¹ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

⁴³² *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

⁴³³ See 3.3.12.

⁴³⁴ *Personal communication* Interview with Nicky Grandy, Cambridge, 1 February 2007; E Couzens.

⁴³⁵ 'CITES and the IWC: The Fall of Conservation? The Downlisting of Minke Whales in the North Atlantic' High North Alliance Publication issued in conjunction with the 1997 CITES meeting in Harare, available on <http://www.highnorth.no/Library/Trade/CITES/ci-an-iw.htm> (accessed 12 May 2006) at 4.

understood with any certainty. Per Watson, although the moratorium had been voted into place, whaling nations ‘made no secret of their contempt for the moratorium’ with Iceland announcing that they would continue whaling under scientific research permits, and the Japanese stating that they ‘saw no legal or moral obligation to accept any decision of the commission concerning the moratorium’. The US had threatened to implement the Packwood-Magnuson Amendment; which, if implemented, would probably force compliance by all whaling nations ‘under threat of crippling sanctions on their fish exports to the United States’.⁴³⁶ ‘What we didn’t know’, writes Watson, however, ‘was that the Reagan Administration had cut a secret deal with the Japanese in December 1984 according to which the Japanese were given a green light to proceed with whaling until 1988’.⁴³⁷

On the other hand, Komatsu and Misaki write that ‘[i]t is generally believed that the IWC banned commercial whaling because whales were nearly extinct. This was a myth created by anti-whaling organizations, and was peppered throughout their propaganda. This myth has been used to strike at the hearts of people and give them a guilty conscience if they even so much as think about eating whale meat. Unfortunately, this myth has become commonly accepted around the world’.⁴³⁸ This charge is disingenuous. It may be that, today, such a claim would be a myth; in the early 1980s, however, there *was* reason for genuine concern.

One obvious question arises. Why, if the Japanese scientific authorities did not believe that whales were endangered, did Japan agree to be bound by the moratorium? Norway, after all, did not. No answer can be definitive; however, most analysts do seem to believe that Japan bowed to pressure from the United States.⁴³⁹

Somewhat cynically put, it is perhaps impossible to work out at any one time precisely what the United States’ view on international environmental law is - unless one claims that it is whatever the US thinks to be in its interest at any one time. The US sometimes seems like a global spider spreading a network of web - one might even wonder whether it is not undisclosed (but determined) US policy to be involved with (and represented at) every global environmental decision, even where a treaty has not been ratified?⁴⁴⁰

In Western countries at least, there is perhaps little awareness that whaling has never actually been *banned*, but has been halted under a moratorium (a zero quota) - ostensibly temporary in nature.⁴⁴¹ Although due to be reconsidered in 1990, the moratorium has not been so

⁴³⁶ See 8.4.

⁴³⁷ P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at 108. See (n 388).

⁴³⁸ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 19-20.

⁴³⁹ Komatsu and Misaki, for instance, state that: ‘[w]hen the moratorium for commercial whaling was adopted in 1982, Japan took action to be exempted ... according to Article V of the ICRW, ... [w]hen Japan objected to the moratorium and was therefore exempt from that decision, the United States threatened that unless the objection was withdrawn, it would phase out the fishing allocation for Japanese trawlers off the West coast of Alaska. At the time, Japan was taking about one million tons of Pollack in the area. As a result of this threat, Japan acceded to the demands and withdrew its objection. The [US] phased out the fish allocation anyway. Thus Japan lost both - whaling and the fishing. Using similar threats, America succeeded in forcing Iceland to accept the moratorium in 1982’. *Ibid* at 90-91.

⁴⁴⁰ The Convention on Biological Diversity, 1992, for example; and the Kyoto Protocol, 1997, to the Framework Convention on Climate Change, 1992. The US has ratified neither, but attends the meetings of both.

⁴⁴¹ In fact, in the present writer’s experience, there appears to be very little informed knowledge about whaling issues in the world generally.

reconsidered and - well into the first decade of the 21st Century - remains in place, despite various efforts which have been made to break the impasse within the IWC.

Arguably, there was very little progress made in resolving the major issues until IWC 49 in Monaco (1997), when Michael Canny, the commissioner for Ireland and newly elected as the IWC chair, attempted to broker compromise. In essence, his proposal was to allow limited and local whaling to take place inside the 200 nautical mile EEZs of coastal states. 'In some respects', comments Friedheim, Canny 'tried to bypass the core problem of completing the Revised Management Scheme'.⁴⁴² The effort was not, however, successful. Andresen states that '[t]he premise for the Irish proposal is that the anti-whaling states will have to give the most, in principle, as they have to accept that commercial whaling can be conducted, implying a fundamental change of policy. For their part, the whaling states will have to abandon any plans for a real revitalization of the whaling industry'.⁴⁴³ Strangely, what the anti-whaling states would have to give would be more of a moral victory than anything else for the pro-whaling states; economically, the latter would certainly, if the proposal had been adopted, have found themselves taking far fewer whales than under either the present moratorium or the Revised Management Plan drafted to replace the moratorium.⁴⁴⁴

Linkage between the IWC and CITES is no invention by the present writer. Both inherently, as multilateral environmental treaties, and explicitly, as mutually dependent, the two are linked. Lyster points out that Article XIV of CITES states that the Convention is not intended to affect the provisions of other international treaties, including those pertaining to 'Customs, public health, veterinary or plant quarantine' and also those creating regional trade agreements affecting customs control such as the Treaty of Rome. In a clear reference, says Lyster, to the ICRW ..., Article XIV(4) relieves Parties, where these Parties are also Party to any other treaty affording protection to 'marine species', of obligations 'imposed by CITES with respect to trade in species in Appendix II which are taken in accordance with the provisions of such other treaty'.⁴⁴⁵ Despite this, shortly after the creation of CITES, the IWC became concerned about possible overlap of their areas. The IWC therefore sent a resolution to CITES, seeking to assert the primacy of the IWC in regard to cetaceans and requesting support from CITES. In 1979 CITES, at COP 2, responded by acknowledging itself to be a supporter of the IWC. This support appeared in three different resolutions, none of which have been repealed.⁴⁴⁶ This communication is an important point of convergence between the two treaties.

Komatsu and Misaki record that the amendment to the Schedule for the moratorium adopted in 1982 states that the 'provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider the modification of this provision and the establishment of other catch limits'. They then argue that 'both Japan and Iceland believed this promise' and that 'Japan also believed that commercial whaling would be

⁴⁴² R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 36. See (n 239), (n 1491), (n 1599) and (n 2287).

⁴⁴³ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 248.

⁴⁴⁴ *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

⁴⁴⁵ S Lyster *International Wildlife Law* (1985) at 275-76.

⁴⁴⁶ A Gillespie 'Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans' Draft article for publication in (2002) 33 *Ocean Development & International Law* 17 at 31-2.

restored after the review' but that this is an undertaking that has never been fulfilled. They conclude that 'so long as the anti-whaling bloc dominates the IWC with the majority votes, it is unlikely that this promise will be fulfilled'.⁴⁴⁷

The lack of trust between IWC members is a major stumbling block to resolution of their impasse. As will be seen, neither pro-whaling members nor anti-whaling members trust each other - and, objectively, it would appear that *both* sides are justified in this mistrust.

Friedheim advises, on the moratorium, that it was imposed to 'provide a pause until a new plan was developed to put whaling on a more scientifically acceptable basis, it was supposed to have been temporary and was due to be reviewed in 1990. But it has become *de facto* a permanent ban on commercial whaling, and the plan needed to lift it - the "Revised Management Scheme" (the management measures needed to supplement a Revised Management Procedure [RMP], which dealt with the scientific issues) - has thus far not been approved'.⁴⁴⁸ He then comments on the possible implications of this in international law; writing that '[i]f the moratorium is sustained *de facto* or *de jure*, it must be considered a watershed event, a rare example of a fundamental shift in nature and purpose of an international resource management regime'.⁴⁴⁹

Stone comments that '[p]erhaps the truculence within the IWC is beyond the balm of any institutional therapy'. He argues that 'the more the issues are conceived as ethical and symbolic, rather than empirical or pragmatic, the less pliant the disputants' and that 'to a large extent, national positions have been hardened - or, more accurately, captured - by inflexible domestic constituencies'. In his view, the basis for what he describes as an 'abdication of policy by central governments is that for the general public in most countries - including the United States and Japan alike - whaling is not a high-salience issue'. The consequence of this is that those few people for whom it is an important issue are able to exercise a disproportionate influence. A further consequence is that states are able to gain domestic kudos without doing very much for it. As Stone puts it, 'for US administrations, charged with foot-dragging on climate change and biodiversity, concession to whaling opponents is a cost-free sop'; and that the same applies to the French, 'who presumably still owe Greenpeace something for having dynamited the Rainbow Warrior'.⁴⁵⁰ Moreover, he reasons, 'as Friedheim astutely observes, the very fact that the IWC has so few issues under its wing cramps opportunities for the sorts of linkages and trade-offs that enable compromises in more expansive arenas'. That is why, he concludes, there is little reason for optimism about change 'via bureaucratic reform'.⁴⁵¹

There is not much that is hopeful to be gleaned from this assessment. The charge is that members are acting, and will continue to act, only in their own interests - unless the matter is of little interest to them.

⁴⁴⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 91.

⁴⁴⁸ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 7.

⁴⁴⁹ *Ibid* at 5.

⁴⁵⁰ See (n 398) and (n 2064).

⁴⁵¹ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 277.

This is not a new summation of the position. Writing in 1973, Burton suggests that it is ‘exasperating’ to consider that ‘over the last three decades’ the IWC’s Scientific Committee has accumulated and analysed much information on the biology of whales, but whaling nations had refused to concur with the accumulated evidence, to reduce quotas, and to allow whale populations to recover. ‘On some occasions’, he writes cynically, ‘nations have left the Commission rather than agree to proposals that would damage their short-term interests’; and that ‘[i]t seems that each country wants to play an equally large part in the killing of the goose that lays the golden eggs’.⁴⁵²

So, the charge has been made from both camps, at different times, that scientific evidence is ignored; and that states continue to act only in their own interests.

3.3 Entrenching the impasse

3.3.1 *More recent Meetings - IWC 46, 1994*

AT IWC 46 in 1994, a proposed Resolution on international trade in whale meat and products was considered. The proposal was made by Argentina, Australia, Brazil, India, Monaco, New Zealand and the US. Japan, however, reminded the meeting of its reservations in CITES; and Norway stated its view that trade was not within the mandate of the IWC. Sweden and Denmark supported the latter view; with Denmark arguing that CITES is the appropriate forum, not the IWC. The Resolution was voted on; and passed with 14 votes in favour, six against, and seven abstentions.⁴⁵³

⁴⁵² R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 171-172. He was writing at a time when states wished to avoid having their whale quotas restricted.

⁴⁵³ IWC ‘Chairman’s Report of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) at 26-27. The Resolution on International Trade in Whale Meat and Products reads:

WHEREAS ... the [IWC] is the universally recognised competent international organisation responsible for the management of whales and whaling; WHEREAS the Commission’s Resolution at its 31st Annual Meeting [] and prior Resolutions, declared that member States should not import whale products from non-member countries; WHEREAS at a Special Meeting in Tokyo in 1978, the Commission recognised that, to reinforce adherence to IWC regulations, it is desirable to use each international opportunity to ban trade in those species and stocks of whales that receive total protection from commercial whaling; WHEREAS at the Special Meeting, the Commission requested the Second Meeting of the [COP of CITES] to take all possible measures to support the IWC ban on commercial whaling for certain species and stocks of whales, as provided in the Schedule to the ICRW; ... WHEREAS in 1979, CITES recognised that the meat and other products of protected stocks of whales are subject to international trade that cannot be controlled effectively by the IWC alone; WHEREAS in 1979, the Second Meeting of the [COP of CITES] recommended that CITES Parties agree not to issue for primarily commercial purposes any import or export permit, or certificate for introduction from the sea, for any specimen of a species or stock protected from commercial whaling by the ICRW; WHEREAS at its Annual Meeting in 1982, the Commission set catch limits for the killing for commercial purposes of whales from all stocks for the 1985 coastal and 1985/86 pelagic seasons at zero, which catch limits remain in effect under paragraph 10(e) of the ICRW Schedule; WHEREAS under CITES there is a prohibition on commercial trade, including introduction from the sea, in all stocks of whales for which the IWC has set zero catch limits; WHEREAS at its Annual Meeting in 1986, the Commission resolved that the products of research whaling should be used ‘primarily for local consumption’; WHEREAS the Commission is concerned by reports of the discovery of whale products appearing for sale in, or *en route* to, importing countries, from no plausible legitimate source; WHEREAS the Commission in 1993 sought information on possible illegal whaling activities by non-member governments, and is concerned to prevent such activities and the trade in whale products derived from such activities; Now, THEREFORE, the [IWC]: (1) CALLS UPON all IWC members to enforce strictly their existing international obligations under the ICRW, including fully complying with the moratorium on commercial whaling declared in paragraph 10(e) of the Schedule and under CITES, relating to the control of international trade in whale products; (2) REAFFIRMS the need for Contracting Governments fully to observe earlier IWC resolutions addressing trade questions, particularly resolutions prohibiting the import of any whale or whale product taken or processed under the jurisdiction of any non-IWC member countries; (3) OBSERVES that any commercial international trade in whale products obtained from research whaling or fisheries bycatch makes illegal commerce more difficult to detect and undermines the effectiveness of the IWC’s conservation program; (4) CONSIDERS, THEREFORE, that meat and products from research whaling should be utilised entirely for domestic consumption; and (5) INVITES [each member to report annually to the

Also in 1994, Dominica felt it necessary, in its Opening Statement, to deny that it had been unduly influenced by Japan. Dominica argued that it ‘has not voted “with Japan” and will continue to be guided in its decisions by the scientific information available within the IWC’.⁴⁵⁴ Probably, few in the anti-whaling bloc believed the words.

Also in 1994, the South African Commissioner took the opportunity to say that:

I’m not a new member country - but I would like to say to Commissioners that, following events in South Africa, we are considered to be a new South Africa ... [Applause] ... Thank you, colleagues. Your applause is much appreciated. I will transmit your applause to our Government. I would like to say, Chairman, that, as you are well aware in the last couple of years, I from this position have been rather quiet for very obvious reasons. I think in the future South Africa - the new South Africa - would like to participate fully in the works and the objectives of the [IWC]. Thank you, Chairman. ... [Applause] ...⁴⁵⁵

The Commissioner from Venezuela argued in the Plenary Session that the IWC was ‘at a crossroads’ but that the crossroads was ‘not a choice to hunt whales or not to hunt whales’; rather, the questions were ‘can we share the planet’s natural sustainable resources in peace and goodwill? Can we respect each other’s cultures and backgrounds?’.⁴⁵⁶

Of relevance for the present thesis, is a submission made by the Commissioner for Grenada which is worth quoting at length:

[t]he Resolution before us [on the proposed Southern Ocean Sanctuary] has gone into so much horsetrading without a scientific basis. Because the proponents of the original Resolution wished to secure certain countries’ support they have taken a purely political decision to move the boundary outside certain EEZs. No scientific basis. My delegation’s proposal for the culling within the sanctuary has not been given any thought because it may involve the taking of limited stock of abundant species identified as the minke whales. ... it is always very dangerous to embark on a sanctuary without making provision for the taking of any species which might cause an imbalance of the ecological mix. Mr Chairman, we know too well that once an amendment is made to the Schedule there is no possibility of turning it back. I must mention that there are dangers in closed areas. Only two nights ago I heard from the observer of Zimbabwe, who is head of the National Parks, and I heard that 13% of Zimbabwe’s territory are under National Parks. They have enough space for 50 000 elephants but, because of CITES regulations, they cannot take any and they have 75 000 elephants. What are we doing to poor developing countries? In Zambia you have the same problem with crocodiles, an endangered species. Because of CITES regulations crocodiles have been stopped from being taken. They have rebounded. They have consumed all the fish in the lakes and now they are consuming fishermen. These are true facts. We know what’s happening to seals around the world. I’ve said so before in my intervention. Now we have whales. We may very well find ourselves ending up with a sea of whales and no fish. That is going to have an impact, not on the developed industrialised world, but on developing countries, and that’s why I have great concern when we establish a sanctuary without scientific basis.⁴⁵⁷

Infractions Sub-committee] ...

Resolution on International Trade in Whale Meat and Products, IWC ‘Chairman’s Report of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) Appendix 7, at 44-45.

⁴⁵⁴ Dominica Commissioner, IWC ‘Opening Statements of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) IWC/46/OS/DOMINICA 1.

⁴⁵⁵ South Africa Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) *Verbatim Record* at 6. See 13.1.2.

⁴⁵⁶ Venezuela Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) *Verbatim Record* at 51.

⁴⁵⁷ Grenada Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) *Verbatim Record* at 52-53.

This is an early example of two arguments important to the present thesis being raised - firstly, the linkage between whales and elephants in international environmental discourse, which linkage will be discussed throughout this thesis; and, secondly, the misunderstanding that it is because of CITES that elephants have become ‘too numerous’. In 1994 it was only five years since CITES had listed the elephant on Appendix I and the listing could hardly be blamed; in any case, the argument shows poor understanding of CITES.⁴⁵⁸

3.3.2 IWC 47, 1995

Japan and Norway put forward a Draft Resolution on Scientific Advice to CITES at the 1995 Meeting. This Draft proposed that the IWC ‘... DIRECTS the Scientific Committee, to assist contracting governments by providing technical assistance in; (1) the preparation of proposals to amend the appendices concerning relevant cetacean species, (2) the review of the effectiveness of the inclusion of relevant cetacean species in the appendices’.⁴⁵⁹ The Netherlands, however, argued that the Draft Resolution failed to recognise the ‘well-established relationship between the two organisations where by CITES had agreed to reflect IWC decisions in its Appendices and automatically sought IWC advice on any proposals involving the relevant species’; and further that it would be ‘a waste of time’ for the SC to undertake the suggested review. The Netherlands argued that the Resolution would confuse the relationship between CITES, the IWC and individual IWC members. Ireland, the UK, the US, Australia, Germany and New Zealand supported these comments. Denmark ‘welcomed the spirit of enhancing collaboration’; but argued that the Resolution was not in conformity with the CITES criterion of ‘taking into consideration the view of intergovernmental organisations with competence for the management of the species concerned’. Japan contended that there was ‘no contradiction’ with Denmark’s view and suggested that, as the moratorium is not based on science, it was ‘not appropriate to impose these ideas on another organisation’. St Lucia ‘wondered if the IWC has to get involved’; while the Russian Federation sought ‘clarification on whether this was a request from CITES for technical assistance’, which it was not. Put to a vote, the Resolution was not adopted (five for, 18 against, with seven abstentions).⁴⁶⁰

Also in 1995, the US proposed a Resolution, co-sponsored by Brazil and Oman, on improving mechanisms to prevent illegal trade in whale meat. The Resolution requests that countries adopt measures which will enable them, by means of disposing of stockpiles, testing markets and identifying whale meat by DNA or isozyme analysis, to prevent whale meat from being ‘taken in contravention of the ICRW and CITES’ - and prohibiting the sale of meat ‘not taken in accordance with ICRW and CITES provisions’. Switzerland was not opposed to the Resolution, but stated that it believed the Resolution went ‘far beyond the scope of the

⁴⁵⁸ It is not because of CITES Appendix I listings that species might become overpopulated. There is nothing contained within an Appendix I listing that prevents a Party to CITES from culling, or otherwise controlling, a population.

⁴⁵⁹ IWC ‘Draft Resolutions of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin). Draft Resolution on Scientific Advice to CITES (IWC/47/48). In favour, Japan, Rep of Korea, Norway, Solomon Islands, Russian Federation; against, Ireland, Netherlands, New Zealand, Oman, South Africa, Spain, Sweden, UK, USA, Antigua & Barbuda, Australia, Austria, Brazil, Chile, Finland, France, Germany, India; abstentions, Mexico, St Lucia, St Vincent & the Grenadines, PR of China, Denmark, Dominica. IWC ‘Report of the Plenary Sessions of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) *Verbatim Record* at 212.

⁴⁶⁰ IWC ‘Chairman’s Report of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) at 34.

[ICRW], while CITES has the competence in international trade’ - it therefore indicated that it would abstain.⁴⁶¹ According to the Commissioner for Switzerland:

Article I of the [ICRW] clearly states that the Convention applies to factory ships, land stations and whale catchers under the jurisdiction of the Contracting Governments and to all waters in which whaling is prosecuted by such factory ships, land stations and whale catchers. Full stop. It does not apply to stockpiles of whale meat or other parts such as baleen or bone which are sold to tourists, for instance in the United States and Canada, nor to internal markets, nor international trade. International trade is in the competence of CITES where this matter has and will be taken care of appropriately.⁴⁶²

Japan, voicing similar concerns to Switzerland, was likewise opposed to the Resolution, and pointed out that there had been no preceding discussion at this meeting about monitoring domestic markets.⁴⁶³ In debate, Japan’s Commissioner argued that ‘this drafted Resolution intended to do something, requests something, for all government, not only the IWC member nations but also all other governments or other entities, and this is clearly going beyond the competence of IWC also’.⁴⁶⁴

Norway, St Vincent and the Grenadines, and the Russian Federation voiced similar concerns to those of Switzerland. Denmark suggested a minor change of wording, which was agreed to by the US; while the Netherlands, Chile, and Antigua and Barbuda suggested that they would support the Resolution. St Lucia expressed concern for starving people, to the US’s suggestion that stockpiles could be destroyed; and in response the US explained that ‘disposal domestically of stockpiles could be carried out by any means’. The Resolution was then adopted: 21 for, three against, with six abstentions. Mexico explained that it had abstained because of ‘the issue of cooperation between international organisations on trade’ and argued that this provided ‘another reason for updating the [ICRW]’. Japan, finally, stated that it ‘will continue its efforts to prevent smuggling of whale products’; but that ‘because of the legal issue and potential conflicts within the Commission’ it was opposed to the Resolution.⁴⁶⁵

⁴⁶¹ *Ibid* at 27.

⁴⁶² Switzerland Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) *Verbatim Record* at 125.

⁴⁶³ IWC ‘Chairman’s Report of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) at 27.

⁴⁶⁴ Japan Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) *Verbatim Record* at 125.

⁴⁶⁵ IWC ‘Chairman’s Report of the Forty-Seventh Annual Meeting’ (29 May-2 June 1995, Dublin) at 27. The Resolution on Improving Mechanisms to Prevent Illegal Trade in Whale Meat, in the end, read as follows:

RECALLING the Resolutions passed in 1994 [] and at [COP9 of CITES, Conf. 9.12] on the prevention of illegal trade in whale meat; WELCOMING the cooperation between the IWC and CITES to address the concern that any illegal trade in whale meat undermines the effectiveness of both the IWC and CITES; NOTING that, as a follow-on to the 1994 CITES and IWC Resolutions, some interested countries attended an informal meeting on control of trade in whale products, hosted by Japan in April 1995; ACKNOWLEDGING that the 1986 IWC commercial moratorium and the strict CITES mechanisms to control international trade in whale meat and products do not prevent countries from selling whale meat in domestic markets from legitimate sources (such as whale meat imported prior to the CITES listing date, whale meat obtained from stockpiles in existence before the IWC moratorium, or from research whaling) and that such internal trade makes illegal commerce in whale meat more difficult to control; RECOGNISING that countries have the right, subject to their obligations under international agreements, to control the domestic distribution and sale of whale meat obtained in accordance with their own laws; NOTING that, at its Annual Meeting in 1994, the Commission resolved that the products of research whaling should be ‘utilised entirely for domestic consumption’; WELCOMING steps that some governments have taken to examine the use of techniques such as DNA analysis to identify by species the origin of whale meat on domestic markets; NOW THEREFORE the [IWC]: CALLS FOR all governments or other entities with a history of whaling to determine whether they have any remaining stockpiles of whale meat; CALLS FOR all governments or other entities with stockpiles of whale meat to report to the 48th Annual Meeting [] and annually thereafter on: - the volume of such stockpiles; - domestic laws governing the possession and sale of whale meat, including *inter alia* provisions to identify the existence and sale of whale meat from stockpiles or other legitimate sources; - all enforcement actions taken with respect to whale meat illegally obtained and/or sold; URGES any government or other entity with a stockpile of whale meat, taken domestically prior to the 1986 moratorium on commercial whaling or imported any time before or after that date, to encourage: - better monitoring of stockpiled meat (such as by establishing a registration system in

After the vote had been taken, Japan's Commissioner noted that Japan 'has been made (*sic*) and will continue its efforts to prevent smuggling attempts in whale products'. He then described the situation as 'rather unfortunate' and suggested that this was because 'one country is willing to make a spontaneous *bona fide* cooperation even knowing the difficulty of the scope of the Convention, but the proposed Resolution would eventually expose an unnecessary conflict among the Commission and I think our Government will reconsider the cooperative position to this Commission'.⁴⁶⁶

3.3.3 IWC 48, 1996

At IWC 48 in 1996, the US, Brazil, New Zealand and Austria proposed a Resolution 'on improving mechanisms to restrict trade and prevent illegal trade in whale meat'; calling on member countries, and other entities, to report on stockpiles of meat, on relevant domestic laws governing sale and possession, on enforcement actions, and calling for support for IWC recommendations and CITES obligations. Japan opposed the Resolution on principle as it is, according to Japan, outside the Commission's competence. Norway took a similar stance. Put to a vote, the Resolution passed (20 for, seven against, two abstentions).⁴⁶⁷ Denmark explained that it had voted 'no' because, although it supported the general intention, in its opinion the matter has nothing to do with aboriginal subsistence whaling and is a matter for CITES. Switzerland abstained, as it thought CITES to be the competent body and that domestic

which all stockpiled whale meat is registered and all sales are reported on a timely basis); and - its disposal domestically in the near future; ENCOURAGES governments or other entities to develop mechanisms using DNA or isozyme analysis to randomly sample and identify whale meat in their market places by species and FURTHER to prohibit the sale of meat from all whales that could not have been taken nor acquired in accordance with ICRW and CITES provisions; and REQUESTS that the IWC Secretariat forward to the CITES Secretariat this Resolution, the report of the Infractions Sub-Committee, and submissions from governments and other entities in response to this Resolution.

IWC 'Chairman's Report of the Forty-Seventh Annual Meeting' (29 May-2 June 1995, Dublin) Appendix 7. In favour were Antigua and Barbuda, Australia, Austria, Brazil, Chile, Denmark, Finland, France, Germany, India, Ireland, Rep of Korea, Monaco, Netherlands, New Zealand, Oman, South Africa, Spain, Sweden, UK, US; against were Japan, Norway and the Solomon Islands; abstentions were PR of China, Dominica, Mexico, St Lucia, St Vincent and the Grenadines, Switzerland. IWC 'Report of the Plenary Sessions of the Forty-Seventh Annual Meeting' (29 May-2 June 1995, Dublin) *Verbatim*

Record at 128.

⁴⁶⁶ Japan Commissioner, IWC 'Report of the Plenary Sessions of the Forty-Seventh Annual Meeting' (29 May-2 June 1995, Dublin) *Verbatim Record* at 128.

⁴⁶⁷ The Resolution on Improving Mechanism[s] to Restrict Trade and Prevent Illegal Trade in Whale Meat reads as follows:

RECALLING the Resolutions passed by the IWC in 1995 [] and 1994 [] and at the Ninth Meeting of the COP to CITES (Res. Conf. 9.12) on illegal trade in whale meat; WELCOMING the continuing cooperation between the IWC and CITES to address the problem of illegal trade in whale meat; ACKNOWLEDGING the current listing of great whale species in Appendix I of the CITES Convention, pursuant to and in recognition of the establishment of zero quotas for commercial whaling agreed by the Contracting Governments to the IWC and other decisions of the IWC, relating to the status of stocks of great whale species; NOTING that the [USA], in cooperation with other countries, is developing a reference set of 'type-species' of DNA sequences for use with other countries in addressing the problem of illegal trade by determining the geographic origin of such products; RECALLING that, at its Annual Meeting in 1994, the Commission resolved that meat and products from research whaling should be 'utilised entirely for domestic consumption'; NOTING that IWC Resolution 1995-6 called upon countries to report to the IWC at its 48th Annual Meeting and annually, thereafter, on the volume of stockpiles of whale meat; NOW THEREFORE the Commission: COMMENDS the Government of Norway for its ban on exports of whale meat and blubber and urges its maintenance and full enforcement; COMMENDS the Government of Japan for the enforcement actions taken with respect to illegal whale meat shipments confiscated in September 1995 and April 1996; CALLS ON all Contracting Governments or other entities to report to the 49th Annual Meeting [], and annually thereafter, on the status of any stockpiles of whale meat, and status of domestic laws governing the possession and sale of whale meat, and on domestic enforcement actions taken with respect to whale meat illegally obtained or sold; URGES all governments to continue to support IWC recommendations and CITES obligations through increased controls, to prevent any further illegal whale meat trade activities and to take appropriate action against offenders; DIRECTS the IWC Secretariat to forward to the CITES Secretariat this Resolution, the Report of the Infractions Sub-Committee, and submissions from governments and other entities in response to this Resolution.

IWC 'Chairman's Report of the Forty-Eighth Annual Meeting' (24-28 June 1996, Aberdeen) Appendix 3, IWC Resolution 1996-3 at 49.

markets are outside of the scope of the ICRW.⁴⁶⁸ In Plenary debate, Japan's Commissioner had argued that '[a]ny market control is outside of the competence of the Convention and in this sense this Resolution could challenge the right and duty of sovereign states and also we are not in the position to acknowledge the listing status of the large whales at the CITES Appendices'.⁴⁶⁹ It was already clear, therefore, that overlap between the two treaties was going to become contentious.

At IWC 48, Zimbabwe, as an observer, made a (written) Opening Statement. Zimbabwe said that '[a]lthough a land locked state, [it] is grateful to the IWC for the lessons learned during this and previous meetings from the discussions held on conservation issues'. Zimbabwe stated that it 'recognises that wild life is a unique economic resource upon which a growing global industry is developing'. The advantage of this particular industry, according to Zimbabwe, lies in its 'ecological sustainability in comparison to other land uses and, for Zimbabwe, its competitive advantage in world markets'. Zimbabwe explained that, 'in accordance with its commitment to conservation and its resolve to promote enhanced sustainable rural prosperity and a more equitable apportionment of the benefits from proper use of the nation's wild life resources', it continues, *inter alia*, to 'participate in those international treaties and conventions which are consistent with Zimbabwe's policies for conservation and sustainable use of wildlife'. Zimbabwe then explained that some animals which were once thought to have been going extinct have recently shown 'spectacular recoveries'. 'A case in point here', ran the Statement:

is the elephant which increased to more than 80 000 by 1980. Today due to the ban on trade in ivory products, the elephant population continues to expand⁴⁷⁰ but to its own detriment as it destroys large areas of vegetation and comes into more conflict with the rural people because they continue to destroy crops and even kill people at times. Under these circumstances, people take the law into their own hands and start killing these elephants illegally as they are not benefiting from these animals. This only erodes the policy of sustainable utilization that Zimbabwe is attempting to promote through its [CAMPFIRE programme] under which rural peoples have the authority to manage their wild life and other natural resources and benefit directly from doing so.

'In 1997', concluded the Statement, 'Zimbabwe will host the 10th CITES meeting in Harare and will promote the principle of sustainable utilisation of renewable resources as an important conservation tool and hopes to encourage all international conservation bodies to adopt the same principle along the same lines'.⁴⁷¹

⁴⁶⁸ IWC 'Chairman's Report of the Forty-Eighth Annual Meeting' (24-28 June 1996, Aberdeen) at 22. The vote ran, for, Netherlands, New Zealand, Oman, South Africa, Spain, Sweden, UK, USA, Australia, Austria, Brazil, Chile, PR of China, Finland, France, Germany, Ireland, Rep of Korea, Mexico, Monaco; no, Norway, St Lucia, St Vincent and the Grenadines, Solomon Islands, Denmark, Grenada, Japan; abstentions were the Russian Federation and Switzerland. IWC 'Report of the Plenary Sessions of the Forty-Eighth Annual Meeting' (24-28 June 1996, Aberdeen) *Verbatim Record* at 150.

⁴⁶⁹ Japan Commissioner, IWC 'Report of the Plenary Sessions of the Forty-Eighth Annual Meeting' (24-28 June 1996, Aberdeen) *Verbatim Record* at 150.

⁴⁷⁰ This is, of course, a misunderstanding of the CITES Appendix I listing - CITES does not have jurisdiction to prevent a member state from taking any appropriate management decisions for any species within its national borders. See (n 933), (n 1226), (n 1658) and (n 2220).

⁴⁷¹ IWC 'Opening Statements of the Forty-Eighth Annual Meeting' (24-28 June 1996, Aberdeen); written Opening Statement by: Zimbabwe (IWC/48/OS/ZIM).

3.3.4 IWC 49, 1997

At IWC 49 in 1997, the IWC considered the results of the 10th CITES COP, held in Harare in June of that year. Japan had put the item on the agenda; and suggested that the COP had seen two major developments: firstly, ‘that nations had moved from a position of total protection to one of sustainable use to achieve their conservation objectives’; and, secondly, that the sovereign rights of nations had been recognised. Japan suggested that the downlisting proposals for gray and minke whales had showed ‘a dramatic change in the level of support made possible by the expression of sovereign rights through the use of the secret ballot’. ‘National policies’, Japan argued, ‘were not dictated by interest groups and differences of culture and ethics were respected’.⁴⁷² The US, however, argued differently; pointing out that ‘the cooperation arrangements between the IWC and CITES were retained’ and that ‘all species of great whales remain listed on Appendix I’ since all downlisting proposals were in fact rejected.⁴⁷³ Norway then argued that the ‘new CITES criteria based on sustainable use and science allows CITES to make its own listing’.⁴⁷⁴ It is illuminating to see that both Japan and Norway sought to bring back lessons from the 10th CITES COP and apply them to the IWC. According to the Chairman’s Report, Japan ‘emphasised the two points made by the IWC observer, which were agreed by the Commission’: that, firstly, ‘CITES parties still see value in keeping the links with IWC but the IWC needs to complete its work on the RMS sooner rather than later, otherwise the scientific basis by which CITES has opted for operating will become frustrated’ and that, secondly, ‘the IWC Secretariat should continue to develop strong links with the CITES Secretariat, and the Scientific Committee should maintain links with the Animals Committee of CITES on relevant issues’.⁴⁷⁵

Also in 1997, the Commission passed a Resolution on Improved Monitoring of Whale Product Stockpiles.⁴⁷⁶ Japan’s Commissioner, in Plenary debate, opposed this Resolution on the basis

⁴⁷² IWC ‘Chairman’s Report of the Forty-Ninth Annual Meeting’ (20-24 October 1997, Monaco) at 40.

⁴⁷³ *Ibid* at 40.

⁴⁷⁴ *Ibid* at 40.

⁴⁷⁵ *Ibid* at 40.

⁴⁷⁶ The Resolution reads as follows:

RECOGNISING the progress in establishing reliable techniques for identifying the origin of whale meat and whale products, including the species and geographic stock of origin and individual identification of legally obtained and marketed whale products, through DNA testing and genetic analysis; NOTING the recent accomplishments of Japan, Norway and the United States in the establishment of reference sets of ‘type species’ of cetacean DNA sequences for use in addressing the problems of unreported bycatch and illegal trade by determining the source species and geographic origin of such products and the development of market survey programmes utilising DNA testing by some member governments; RECOGNISING that some whale products legally sold in the domestic markets of some countries are from sources (such as frozen stockpiles and fisheries bycatch) that are not systematically sampled, making it difficult for fisheries personnel to develop market survey programmes to determine the origin of whale meat sold commercially; RECOGNISING FURTHER that CITES has called upon member nations to report on the status of stockpiles of whale meat, in order to facilitate the monitoring of illegal trade, and has invited all countries concerned to cooperate in determining the sources of whale meat in cases of smuggling or unknown identity; NOW THEREFORE the Commission: ENCOURAGES all Contracting Governments to provide information to the IWC about the size of remaining stockpiles and the species of origin of meat remaining in stockpiles, and to collect and inventory skin or meat samples for DNA identification from all whales that enter into commerce, and to make the DNA database available to the IWC; REQUESTS that the IWC Secretariat forward to the CITES Secretariat this Resolution and this year’s reports of the Infractions Sub-committee and the Scientific Committee.

IWC ‘Chairman’s Report of the Forty-Ninth Annual Meeting’ (20-24 October 1997, Monaco) Appendix 2, IWC Resolution 1997-2. The vote went: for, Sweden, Switzerland, UK, USA, Australia, Austria, Brazil, Chile, PR of China, France, Germany, Ireland, Monaco, Netherlands, New Zealand; against, Antigua and Barbuda, Dominica, Grenada, Japan, Norway, St Lucia, St Vincent and the Grenadines, Solomon Islands; with abstentions being South Africa, Spain, Argentina, Denmark, Finland, Rep of Korea, Mexico, Oman, and the Russian Federation.

that the IWC does not have ‘a management capacity’ over the issue.⁴⁷⁷ Denmark’s Commissioner then added that Denmark has ‘a little concern about this whole exercise about the competence between IWC or World Trade Organisation and CITES’.⁴⁷⁸ Later, the Danish Commissioner added more definitely that his country felt that the area was ‘the competence of CITES, the competence of the World Trade Organisation’.⁴⁷⁹

Japan, in its written Opening Statement, said that it would, during the meeting, ‘make every effort to accommodate whatever reasonable requests are made of us ... We are very willing to make whatever compromises are necessary to ensure the safety of whale populations and relieve the anxieties of those opposed to whaling’. Japan cautioned, however, that it could not ‘betray the principles upon which this organization was founded, nor the principles of other international compacts such as UNCLOS, Agenda 21, CITES, and the Kyoto Declaration’. ‘Please remember’, asked Japan, ‘that at the last CITES meeting in Zimbabwe, a majority of nations voted to allow the sustainable use of abundant whales such as minke. And 53 nations - almost twice the number of nations opposed to whaling at the IWC - voted to downlist the abundant Antarctic minke whale populations and allow sustainable use. The CITES vote made it very clear that most of the people in the world would approve of whaling if it does not endanger the whale populations’. The IWC, suggested Japan, has the responsibility to ensure that this does not happen.⁴⁸⁰

Norway, in its Opening Statement, said that ‘[t]here was a clear international recognition of science as the basis for conservation discussion at the [CITES] meeting in Harare in June this year’; where a ‘majority voted in favour of down-listing the Northeast and Central Atlantic minke whale stocks, although less than the 2/3 majority needed to change the listing’. Norway then stated that it was ‘convinced that there will be further progress’ in respect of whale at the next CITES meeting, ‘as the principle of sustainable use is increasingly gaining support internationally’. Norway then explained that it wished to underline ‘the division of competence between CITES as a trade organisation and IWC as a management organisation’.⁴⁸¹

In Plenary debate, Japan indicated that it wished to discuss the 10th COP of CITES ‘intensively’. Japan’s Commissioner then described the COP as having been ‘an historical moment in the period of international conservation of wildlife resources’. The Commissioner suggested that Japan had observed ‘two major achievements’ at the COP; these being firstly that ‘the nations of us (*sic*) have moved from total protectionist attitude to the acceptance of the principle of sustainable use as the major mechanism to achieve conservation objectives’ and, secondly, that ‘the governments have shown a total determination in enforcing the notion

⁴⁷⁷ Japan Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Ninth Annual Meeting’ (20--24 October 1997, Monaco) *Verbatim Record* at 149.

⁴⁷⁸ Denmark Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Ninth Annual Meeting’ (20--24 October 1997, Monaco) *Verbatim Record* at 149.

⁴⁷⁹ *Ibid* at 150.

⁴⁸⁰ IWC ‘Opening Statements of the Forty-Ninth Annual Meeting’ (20--24 October 1997, Monaco); written Opening Statement by: Japan (IWC/49/OS/JAP).

⁴⁸¹ IWC ‘Opening Statements of the Forty-Ninth Annual Meeting’ (20--24 October 1997, Monaco); written Opening Statements by: Norway (IWC/49/OS/NOR).

of sovereign rights and in protecting their respective right'.⁴⁸² Japan argued that the 'overall result of COP 10 dealing with the enforcement of sustainable use' was evident from the number of proposals to downlist 'so-called charismatic' species - such as 'whales, elephants, sea turtles and rhinos'. Japan described the downlisting of the Botswana elephant population (by 74 votes to 21), of the Namibian population (by 74 votes to 22) and the Zimbabwean population (by 77 votes to 23) as an 'indication of this change of attitude within the state parties'.

Further 'encouragement' came from the support (60 votes to 32) for the South African proposal to trade in white rhinoceros horn; and the support (59 for, 53 against) for the Cuban proposal to downlist hawksbill turtles.⁴⁸³ The Japanese Commissioner then pointed out that, in respect of whales, four proposals for downlisting were voted on: three by Japan and one by Norway. Japan's last proposal 'received 53 votes in favour and 59 against'. 'The following proposal coming from Norway', he continued, 'received a majority vote of 57 in favour, 51 against'. 'These votes', he suggested, 'constitute a drastic change compared with COP 9 in 1994 when the Norwegian proposal received a low level of support'.⁴⁸⁴ The Commissioner proceeded to argue that it had been the use of the secret ballot at CITES COP 10 that had 'helped the Governments in voting in that election in line with their national interest in the philosophy'; since they could, in this way, avoid 'appropriate (*sic*) pressure from other governments and extremist groups'. The secret ballot, he argued, 'has in fact been the total needed to achieve greater sovereignty'.⁴⁸⁵ The Japanese Commissioner then argued that:

[s]ome very important messages sent to the international community by COP 10 were, among others, the following. Sustainable use shall not apply only to chickens and cows but as well to all species of plants and animals of the world. Number 2, developing countries will not accept to have their conservation policies dictated any longer or enforced by so called interest groups. Interference of so-called interest groups into the affairs of other sovereignty issues shall not take place from now on. Number 4, difference of the culture, tradition, ethics and values shall be respected by all. In reality, Mr Chairman, the CITES community which is more than three times larger than the IWC memberships including more than ninety five per cent of the membership of the IWC is to represent the world opinion and CITES itself has come from dealing with species to caring for people and species. It has moved from applying blanket prohibition to seeking solutions for conservation problems. CITES has finally espoused the agreement of the UN Convention, UN Conference on Environment and Development and recognised sustainable use of living resources as a means to solve conservation problems.⁴⁸⁶

The Commissioner for the US, however, responded that 'some delegations seem to have been comforted by the minor changes in the voting record at the recent CITES meeting'; whereas 'it is still a fact that all downlisting proposals for whales were rejected and that', in his opinion, was what was really 'reflective of the true international opinion'. The US pointed out also that, at CITES COP 10, a proposal to rescind CITES Resolution 2.9 (which had acceded to the IWC's request to CITES to recommend to its parties that they refrain from issuing export or import permits for any species protected by the IWC from commercial whaling) was defeated 'overwhelmingly' by a vote of 51 (against) to 27 (for).⁴⁸⁷ Norway responded, however, by

⁴⁸² Japan Commissioner, IWC 'Report of the Plenary Sessions of the Forty-Ninth Annual Meeting' (20--24 October 1997, Monaco) *Verbatim Record* at 19.

⁴⁸³ *Ibid* at 20.

⁴⁸⁴ *Ibid* at 20.

⁴⁸⁵ *Ibid* at 20.

⁴⁸⁶ *Ibid* at 20.

⁴⁸⁷ United States Commissioner, IWC 'Report of the Plenary Sessions of the Forty-Ninth Annual Meeting' (20--24 October 1997, Monaco) *Verbatim Record* at 20-21.

arguing that the US's point should not be interpreted to give the impression that there is a 'cross link' between the Conventions, such that CITES cannot downlist species unless the IWC moratorium has been changed. Norway pointed out that the Resolution referred to by the US 'is a recommendation to Governments to follow the practice of not trading while the moratorium' is in place. Norway then highlighted the fact that 'CITES over the last couple of years have established new criteria' for listing of species; and that these criteria are based on the sustainable use concept, with science as the basis, which makes it 'quite clear that CITES on its own basis according to its criteria can list species on list one or two'.⁴⁸⁸

Of other countries, Brazil argued that the IWC is the 'recognised and appropriate forum to decide upon matters relating to the conservation of cetaceans'; and that, therefore, the Commission 'has authority over issues such as the trade in whale meat, in so far as it directly effects (*sic*) whale conservation worldwide'.⁴⁸⁹ This view has been expressed before; a point in support which it overlooks is to mention that the UNCLOS actually mentions 'appropriate managing authorities' in respect of cetaceans,⁴⁹⁰ and that this has long been considered a reference to the IWC.

Australia's Commissioner said that he thought that 'all those who attend the meetings of that sort [meaning CITES COP 10] develop their own interpretation and I wouldn't say that the Australian interpretation equates with that in Japan'. He suggested that, from Australia's perspective, the 'most significant outcome of the Harare meeting was the overwhelming vote in favour of maintaining close relations between this Convention and the [CITES]'.⁴⁹¹

St Lucia's Commissioner then suggested that it might be 'time to renegotiate this Convention where Governments interested in the global moratorium on whaling and a global Sanctuary for whaling would go their way and a new IWC would emerge, one which is interested in regulating whaling'. What the world needs, continued the Commissioner for St Lucia, is 'to take the global view, the new global view, of sustainable utilisation in stride'.⁴⁹²

While opinions differed on the degree of relevance for the IWC of the decisions made at CITES COP 10, what is not in doubt is that the pro-whaling IWC members sought to use it as a precedent in support of their arguments in the IWC.

3.3.5 IWC 50, 1998

At IWC 50 in 1998, in the Technical Committee, Norway, with Japan in support, argued that discussion of stockpiles of whale products and trade questions are 'not within the scope of the Convention'. Japan 'noted the adoption of a decision on trade in whale meat adopted at' CITES COP 10; and both Japan and Norway stated that they were 'willing to discuss such matters in what they considered to be the appropriate fora (WTO and CITES)'.⁴⁹³ In the Commission itself, the Netherlands, supported by the UK, 'voiced its concern over illegal

⁴⁸⁸ Norway Commissioner; *ibid* at 21.

⁴⁸⁹ Brazil Commissioner; *ibid* at 21.

⁴⁹⁰ See Annex D.2; esp. at D.2.3.

⁴⁹¹ Australia Commissioner; *ibid* at 22.

⁴⁹² St Lucia Commissioner; *ibid* at 22.

⁴⁹³ IWC 'Chairman's Report of the Fiftieth Annual Meeting' (16-20 May 1998, Oman) at 9.

trade and urged thorough investigation and action'. Japan 'reiterated its view that matters of trade and its domestic market fall outside the IWC and are under its [Japan's] own sovereignty, although it cooperates with CITES in international, and TRAFFIC Japan on domestic, issues'.⁴⁹⁴

The US, with Australia, Brazil, Monaco, New Zealand and Oman, proposed a Resolution on continued cooperation between the IWC and CITES. The focus of this Resolution was particularly on the problems of illegal trade in whale products. The UK and Denmark supported the Resolution; but felt that they could not co-sponsor it, as the European Union 'is responsible for their trade affairs'. Norway did not give support as it felt that the Resolution trespassed on the competence of other organisations; Japan expressed its view, as before, that the issue is outside IWC competence - and also that some of the Resolution's paragraphs were 'contrary to the facts'. Japan, seconded by Antigua and Barbuda, proposed a number of amendments. After several drafts and revisions, the Resolution went to a vote and was adopted; by 23 votes for, seven against, with three abstentions.⁴⁹⁵

The US had introduced the Resolution by welcoming the 'recent decision by [the 10th CITES COP] to uphold Resolution Conference 2.9 in which Parties to CITES recognise the mandate of the IWC'. 'That Resolution', continued the US, 'solidifies a relationship that began in 1978⁴⁹⁶ with an IWC Resolution requesting that CITES member states take all possible measures to support the IWC ban on commercial whaling for certain stocks and species'. Since that time, the US continued, 'CITES has taken numerous actions in support of IWC initiatives including recommending that Parties not issue any export or import permits for trade in any whale stocks for which the IWC has set catch limits'. The US recommended that it was therefore important to recognise CITES' important role in supporting the IWC - 'and to reaffirm the importance of continued cooperation between the IWC and CITES'.⁴⁹⁷ Norway, however, argued that 'Resolution 2.9 ... is simply a reference to individual governments not to issue export permits'. 'It does not', Norway said, 'set up the sort of relationship between CITES and the IWC which is claimed in the Resolution and which was referred to in the US

⁴⁹⁴ *Ibid* at 10.

⁴⁹⁵ *Ibid* at 32. The Resolution on Cooperation Between the IWC and CITES reads as follows:

WHEREAS it is the purpose of the Commission to provide for the effective conservation and management of whale stocks; WHEREAS the Commission is the universally recognised competent international organisation for the management of whales and whaling; RECALLING that the IWC has passed resolutions welcoming the continuing cooperation between CITES and the IWC on the issues related to trade in whale meat, and urging all governments to continue to support IWC and CITES obligations with respect to this issue; WHEREAS the [COP of CITES] recognised in Res. Conf. 2.9 the mandate of the IWC, and requested that the CITES Secretariat consult with the IWC concerning proposals to amend the CITES appendices; ACKNOWLEDGING that all species of whales in the Schedule to the IWC have been listed in Appendix I by CITES (with the exception of the West Greenland stock of minke whales which is listed in Appendix II by CITES) pursuant to and in recognition of the establishment of zero quotas for commercial whaling agreed by the Contracting Governments to the IWC, and other decisions of the IWC relating to the status of great whale species; WHEREAS CITES has recommended that Parties not issue any import or export permits for trade in any whale stocks for which the IWC has set zero catch limits; WELCOMING the recent decision by [the 10th COP of CITES] to uphold Res. Conf. 2.9; NOW THEREFORE the Commission: EXPRESSES its appreciation to the [COP of Parties] to CITES for its reaffirmation of the relationship between CITES and the IWC; RECOGNISES the important role of CITES in supporting the conservation of whale stocks and the IWC's management decisions, and reaffirming the importance of continued cooperation between CITES and IWC; REAFFIRMS the need for Contracting Governments to observe fully IWC resolutions (IWC Resolutions 1994-7; 1995-6; 1996-3; 1997-2) addressing trade questions, in particular with regard to the problem of illegal trade in whale products; URGES all governments to provide the information specified in previous resolutions to the Commission; DIRECTS the IWC Secretariat to forward this resolution, and this year's reports of the Infractions Sub-committee to the CITES Secretariat.

Ibid; Appendix 9, IWC Resolution 1998-8 at 45-46. See (n 1299) and (n 1300).

⁴⁹⁶ *Sic*. Probably 1977 is meant.

⁴⁹⁷ USA Commissioner; IWC 'Chairman's Report of the Fiftieth Annual Meeting' (16-20 May 1998, Oman) at 149.

statement’.⁴⁹⁸ The Japanese Commissioner was firmer; arguing that the Resolution ‘actually trespasses or it is outside the competence of the IWC’.⁴⁹⁹

At IWC 50, Zimbabwe, as an observer, again submitted a written Opening Statement. Zimbabwe stated that it had, for many years, ‘supported the scientific findings dealing with the conservation of the whole ecosystem and not those dealing with the protection of only a specific or charismatic species: the disastrous imbalance then created to the ecosystem has been experienced on numerous occasions in different parts of the world and needs to be avoided’.⁵⁰⁰ This is an interesting example of Zimbabwe picking up on the way in which the ‘ecosystem approach’ has recently been reinterpreted by the pro-whaling group to support its arguments for resuming commercial whaling. ‘Zimbabwe’, the Statement continued, ‘subscribes to the notion that the best people to ensure the conservation of the wildlife resources are those who closely interact with such resources. Zimbabwe’s conservation efforts and programs are based on the knowledge and understanding that its local communities have of the said resources’.⁵⁰¹

Also at IWC 50, Japan, in its Opening Statement, suggested that there was a ‘need within the IWC for compromise’; and that such compromise ‘must be based on the ICRW and other relevant instruments including UNCLOS, Agenda 21 [the global blueprint for sustainable development, 1992], CITES and the Kyoto Declaration [on Food Security of 1995]’.⁵⁰²

3.3.6 IWC 51, 1999

There was increased interest in the relationship between CITES and the IWC at IWC 51 in 1999, in Grenada, where a Resolution on cooperation between the IWC and CITES was introduced by the US, co-sponsored by Austria, Brazil, Monaco, Finland, France, Germany, Ireland, Italy, Mexico, Netherlands, New Zealand and the UK. The Resolution ‘commented that all species of whales’, apart from the West Greenland minke (listed on Appendix II), are listed on CITES Appendix I. Norway considered this to be an attempt to divert the legal responsibility of the IWC, as CITES is concerned with species threatened with extinction. Grenada and Japan agreed; with Japan arguing that the zero catch limit is a political decision, and that CITES should make its own judgments. Japan argued also that ‘the FAO promotes the sustainable use of resources’; and stated that it, Japan, felt that CITES, rather than the IWC, should manage whale stocks. Denmark, likewise, felt that ‘trade issues are the concern of CITES and the WTO’. Voted on, the Resolution was adopted with 21 for, ten against, and three abstentions.⁵⁰³

⁴⁹⁸ Norway Commissioner; *ibid* at 150.

⁴⁹⁹ Japan Commissioner; *ibid* at 150. The vote on the Resolution reflected, in favour, Germany, India, Ireland, Italy, Mexico, Monaco, Netherlands, New Zealand, Oman, South Africa, Spain, Sweden, Switzerland, UK, USA, Argentina, Australia, Austria, Brazil, Chile, Denmark, Finland, France; against, Japan, Norway, Russian Federation, St Lucia, Solomon Islands, Antigua & Barbuda, Dominica; with the Rep of Korea, St Vincent and the Grenadines, and the PR of China abstaining. *Ibid* at 192-193.

⁵⁰⁰ IWC ‘Opening Statements of the Fiftieth Annual Meeting’ (16-20 May 1998, Oman); written Opening Statement by: Zimbabwe (IWC/50/OS/ZIM).

⁵⁰¹ *Ibid*.

⁵⁰² *Ibid*; written Opening Statement by: Japan (IWC/50/OS/JAPAN).

⁵⁰³ IWC ‘Chairman’s Report of the Fifty-First Annual Meeting’ (24-28 May 1999, Grenada) at 34. As adopted, the Resolution on Cooperation Between the IWC and CITES reads as follows:

WHEREAS it is the purpose of the [IWC] to provide for the effective conservation and management of whale stocks;

In proposing the Resolution, the US Commissioner suggested that ‘the IWC and CITES are both interested in whales; while the IWC provides for conservation and management of whale stocks, CITES regulates their international trade’; and, further, that, as the two organisations provide for different aspects of regulation of the same species, it is ‘imperative that [they] cooperate as closely as possible’.⁵⁰⁴ Norway’s Commissioner, however, responded by suggesting that Norway saw ‘this Resolution as another attempt to prevent CITES to adhering (*sic*) to its own legal basis, the CITES convention according to which only species or stocks that are threatened with extinction should be listed in Appendix I’; and, harshly, that the ‘IWC should not try to impose its own habits of diverting from the legal rules governing its activities on other organisations with independent responsibilities’.⁵⁰⁵ Along the same lines, the Commissioner for Antigua and Barbuda said that ‘we find that this is sort of confrontational and is tantamount to a subtle interference by the IWC in the affairs of CITES which should never be tolerated, and we think it is a way in which this organisation attempts to direct and influence the work of another independent organisation’. Antigua and Barbuda then argued that the IWC ‘has no competence in trade’; and that the IWC was ‘engaged in an expansionist tendency which is reflective of the type of domination that is being attempted in this organisation by a few countries, a minority of countries’ and that the Resolution was ‘dangerous’.⁵⁰⁶

WHEREAS the IWC is the universally recognised competent international organisation for the management of whale stocks; ACKNOWLEDGING with satisfaction that all species of whales in the Schedule to the IWC (*sic*) have been listed in Appendix I of CITES (with the exception of the West Greenland stock of minke whales, which is listed in Appendix II by CITES) pursuant to and in recognition of the establishment of zero catch limits for commercial whaling agreed [by the IWC], and other decisions of the IWC relating to the status of great whale species; WHEREAS by virtue of the inclusion of these species in CITES Appendix I and Resolution Con. 2.9, CITES requires that Parties not issue any import or export permits for commercial trade in any whale stocks for which the IWC has set zero catch limits; WELCOMING the recent decision by the 10th [COP of CITES] to uphold CITES Res. Conf. 2.9; WELCOMING as well the recent decisions of the 10th [COP of CITES] (Decisions 10.40-10.43) that recognised the need for international cooperation in monitoring and controlling the illegal trade in whale meat; RECOGNISING that the IWC has made progress toward completing the Revised Management Scheme, specifically by the endorsement of the Revised Management Procedure, by the revision of the requirements and guidelines for conducting surveys and analysing data within the Revised Management Scheme, and by the clarification of arrangements to ensure that total catches over time are within the limits that would be set under the Revised Management Scheme; NOW THEREFORE the Commission: RECOGNISES that the IWC management regime prior to the establishment of zero catch limits for commercial whaling led to the global demise of the whale stocks; FURTHER RECOGNISES that the IWC has not completed the necessary measures to ensure that commercial whaling catch limits are not exceeded, that whale stocks can be adequately protected, and that all whaling by IWC member countries is brought under effective IWC monitoring and control; RECOGNISES the important role of CITES in supporting the conservation of whale stocks and the IWC’s management decisions, and reaffirming the importance of continued cooperation between CITES and the IWC; RECOGNISES as well the important role of CITES in detecting illegal trade in whale meat through inclusion of whale species in CITES Appendix I; EXPRESSES its appreciation to the [COP of CITES] for its continuing reaffirmation of the relationship between CITES and the IWC; DIRECTS the Secretariat, when the IWC is requested to provide comments on any proposal submitted by a CITES Party to transfer any whale species or stock from Appendix I to II, to advise the CITES [COP] that the IWC has not yet completed a revised management regime which ensures that future commercial whaling catch limits are not exceeded and whale stocks can be adequately protected; FURTHER DIRECTS the Secretariat to advise the CITES [COP] that zero catch limits are still in force for species of whales which are managed by the [IWC]; ...

IWC ‘Chairman’s Report of the Fifty-First Annual Meeting’ (24-28 May 1999, Grenada) Appendix 7, IWC Resolution 1999-6 at 54. In the end, the vote ran, in favour, Switzerland, UK, US, Argentina, Australia, Austria, Brazil, Chile, Finland, France, Germany, Ireland, Italy, Mexico, Monaco, Netherlands, New Zealand, Oman, South Africa, Spain, and Sweden; against, Antigua and Barbuda, Dominica, Grenada, Japan, Norway, Russian Federation, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Solomon Islands; with PR of China, Denmark and the Rep of Korea abstaining. IWC ‘Report of the Plenary Sessions of the Fifty-First Annual Meeting’ (24-28 May 1999, Grenada) *Verbatim Record* at 141. See (n 1301).

⁵⁰⁴ United States Commissioner, IWC ‘Report of the Plenary Sessions of the Fifty-First Annual Meeting’ (24-28 May 1999, Grenada) *Verbatim Record* at 134.

⁵⁰⁵ Norway Commissioner; *ibid* at 135.

⁵⁰⁶ Antigua and Barbuda Commissioner; *ibid* at 136.

Japan's Commissioner said that 'CITES should make its own judgement based on the scientific information provide[d] by the IWC. However, this zero catch limit is a politically decided figure, it is irrelevant, it is not relevant to the resource of stock status'. The Commissioner went on to argue that 'this kind of action here at this Commission is quite a serious problem which demonstrates the serious nature of the problem encountered by this Commission'.⁵⁰⁷ The Commissioner from St Lucia then argued that 'there is a light at the end of the tunnel and this Resolution gives me an impression that there is desperation, desperation in the sense that we have to remind CITES that there exists a relationship between the two organisations'. '[T]ry as we may', the Commissioner went on, '140 countries next year will take the right decision, they did it a few years ago on the elephant and they know what to do'. Finally, the Commissioner suggested, sarcastically, that the name of the ICRW might appropriately be changed to the 'International Convention for the Lock Up of Whales'; but, that 'next year CITES, an independent body with 140 countries around the world who believe in the sustainable use of living marine resources[,] will take the right decision'.⁵⁰⁸ The Solomon Islands Commissioner suggested that 'here we have two organisations, one with 40 members and one with 140, and 40 members are trying to decide on behalf of the organisation that has 140 members, that is a bit of a contradiction to the principle of fairness'.⁵⁰⁹

Switzerland, on the other hand, felt that the Resolution did not 'contest the competence of both organisations;' but that it only made a direction to the Secretariat of the IWC.⁵¹⁰ Oman explained that its view was that the 'IWC is the appropriate organisation for conservation and management of whaling'.⁵¹¹

Australia explained that 'at the last CITES meeting, Japan moved a Resolution that relationships between CITES and the IWC should be radically changed so that CITES no longer requested the advice of this Commission'. 'Fortunately', the Australian Commissioner continued, 'that Resolution was defeated by a very large majority'; and that subsequent debate within the IWC had concerned whether appropriate information had been given to CITES or not, and that this Resolution was intended to clear up such confusion. Further, the Commissioner argued that he found it 'intriguing' that Japan was 'arguing strenuously for increased cooperation between this organisation and others in one part of the debate when it would favour their position'; but that 'when they see perhaps the cooperation with another organisation may not favour their position, suddenly such cooperation is outside the competence of this body'. Further, he suggested, 'Japan argues, and has argued loudly and long, within CITES that that body should have no jurisdiction in marine fisheries. It argues in this body that CITES is the appropriate organisation to have jurisdiction in whale fisheries'.⁵¹²

In response, the Japanese Commissioner said that 'the Resolution that was mentioned, ... was submitted by Japan to COP 10 of CITES in 1997 and we gave the support of [29] votes and unfortunately the Resolution failed, but that Resolution was intended to strengthen the relationship between CITES and the Scientific Committee of the IWC. Because the bottleneck

⁵⁰⁷ Japan Commissioner; *ibid* at 137.

⁵⁰⁸ St Lucia Commissioner; *ibid* at 138.

⁵⁰⁹ Solomon Islands Commissioner; *ibid* at 139.

⁵¹⁰ Switzerland Commissioner; *ibid* at 136-137.

⁵¹¹ Oman Commissioner; *ibid* at 137.

⁵¹² Australia Commissioner; *ibid* at 139.

of the problem of lack of flow of scientific information from the Scientific Committee of the IWC to the CITES is this Commission itself'. The Japanese Commissioner then argued that, by analogy, the FAO functions 'normally in the light of its constitution, [as] it is promoting sustainable use of resources which is in line with the main objective stipulated in the constitution [of] FAO, ... [t]herefore since the FAO has expertise on marine species, marine resources, the FAO should have practical responsibilities for the management of the marine species'. However, the Commissioner went on, 'as far as whales are concerned, this very Commission, the IWC is not functioning in accordance with the spirit and the letter of the ICRW, and that normal management of the whale stocks are not expected from this Commission and therefore we think it reasonable to ask CITES to manage whale stocks rather than leaving it up to the IWC'.⁵¹³

With this Resolution, the IWC reaffirmed the importance of its relationship with CITES and advised CITES once again that zero catch limits are still in force for all species of whales managed by the IWC.⁵¹⁴ It is not spurious for the present writer to link CITES and the ICRW/IWC - the parties and the organisations have made the link themselves.

Of course, while it is essential to establish as many links as possible between CITES and the ICRW/IWC, for full understanding, it is the specific links between elephants and whales that this thesis remains most interested in.

At IWC 51, Zimbabwe again gave a written Opening Statement, in which it said that '[t]o illustrate the principle of promotion of sustainable management of wildlife, the President of Zimbabwe during his opening remarks to the CITES (COP 10) Conference ... referred to "... utilize and elephant to manage[illegible] an elephant ...". The outcome of that conference ... Zimbabwe undertook the experimental trade in ivory with Japan in April 1999 ... The funds realized from this sale of ivory will be used for elephant management and for development projects in areas where people live with elephants, thus bringing value to these elephants ...'. Zimbabwe concluded its Statement by saying that it 'strongly believes that its philosophy of sustainable use applies equally to its native elephants and to all other living species, including whales, for the greater benefit of people, their respective culture and traditions'.⁵¹⁵ It is interesting that Zimbabwe, despite having been given the restricted downlisting of the elephant that it had argued for at CITES COP 10, still considered it useful to use the IWC as a forum to push their views.

3.3.7 IWC 52, 2000

At IWC 52, held in Adelaide in 2000, Japan asked that the NGO Greenpeace's Observer credentials be withdrawn - due to a collision between a Greenpeace vessel and a Japanese research vessel in the Antarctic. It is worth mentioning here simply because the US 'noted that there were conflicting accounts of the incident ... and that CITES had taken no action in

⁵¹³ Japan Commissioner; *ibid* at 141. On the FAO, see 14.1.3; also see (n 132) and (n 152).

⁵¹⁴ 'Resolution on Cooperation Between the IWC and CITES' - 1999-6 IWC/51/43.

⁵¹⁵ IWC 'Opening Statements of the Fifty-First Annual Meeting' (24-28 May 1999, Grenada); written Opening Statement by: Zimbabwe (IWC/51/OS/ZIM).

response to a similar request'.⁵¹⁶ It is significant, of course, that Japan had tried using both CITES and the IWC as *fora* for protest against an NGO which had protested against whaling.

At IWC 52, Japan reported that it, together with Norway, had proposed, at CITES COP 11, 'the downlisting of minke whales in the Antarctic, North Atlantic and North Pacific, and gray whales in the eastern North Pacific'. Japan then pointed out that 'more countries supported these proposals than are members' of the IWC. Japan suggested further that the IWC needed to 'make real progress' on the completion of the RMS in the 'two year grace period' before CITES COP 12 in 2002, or risk losing 'its credibility'.⁵¹⁷ Brazil, however, expressed the view that 'the synergy between the two organisations maintained the competence of the IWC for the conservation of whales'; and argued that attempts to reopen trade were premature and would be 'detrimental to this relationship'. Norway argued that this 'synergy' was negative; and expressed its opinion as being that 'CITES hides behind the IWC on the question of downlisting'.⁵¹⁸ The Chairman argued that the views which the CITES Secretary-General had expressed were a 'clear signal that the RMS should be finalised'; although the views were 'not necessarily a view of the [COP]'. South Africa agreed with the Chairman strongly. St Lucia suggested that it was 'concerned about the perception of the IWC from the outside'; and, 'referring to the letter from the CITES Secretary-General', suggested that 'the only reason that whales have not been downlisted is because of the agreement the IWC has with CITES not to do anything to undermine the IWC'.⁵¹⁹ The UK explained that, in its opinion, the letter from CITES 'expressed the views of the CITES Secretariat, not those of the organisation' itself. Australia 'associated itself' with the UK's views on the letter. St Vincent and the Grenadines, however, stated that it disagreed with the UK's interpretation of the CITES letter.⁵²⁰

In Plenary discussion, Japan's Commissioner argued that the results of the vote on downlisting at CITES COP 11 'shows that the proposal and contention by Japan and Norway, namely the management of the whale stocks should be based upon the scientific evidence' is 'now well accepted by the many countries of the world'. Japan argued further that the result, of more countries voting for downlisting than there are signatories to the IWC, showed that the view that 'the whaling ban is international public opinion' is wrong. The Japanese Commissioner then suggested that 'by the next COP of CITES unless we start sustainable commercial whaling with the completion of RMS the international society will consider IWC as having abandoned its responsibility for the management of whale stocks and that IWC is going to lose its credibility'.⁵²¹ The Norwegian Commissioner argued that 'synergy between the organisations CITES and the IWC, ... has been a negative one. It is almost, if I may use a popular expression, a Catch-22 situation, where you see the CITES hiding behind the back of the IWC on the issue of transferring the minke whale from Appendix I to Appendix II'.⁵²²

The Commissioner from Switzerland expressed the view that the Chairman of the IWC had advised CITES in 1997 in Harare, and again in 2000 in Nairobi, that the IWC 'is very close

⁵¹⁶ IWC 'Chairman's Report of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide) at 11.

⁵¹⁷ *Ibid* at 43.

⁵¹⁸ *Ibid* at 43.

⁵¹⁹ *Ibid* at 50.

⁵²⁰ *Ibid* at 51.

⁵²¹ Japan Commissioner, IWC 'Report of the Plenary Sessions of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide) *Verbatim Record* at 26.

⁵²² Norway Commissioner; *ibid* at 26.

before closing the work on the RMS'. The Commissioner said that he doubted 'if in the year 2002 when the next CITES Meeting is going to be held the Chairman should be forced to say the same statement again. I don't think the world will understand why this body takes more than seven years to finalise what is now a document of about five pages'.⁵²³ Switzerland's position is not always along the lines that might be expected, given its geographic and political closeness to anti-whaling states.

Zimbabwe again delivered a written Opening Statement; in which it stated that '[t]his meeting comes hardly two months after CITES COP 11 held in Kenya, where for us, the concept of sustainable utilization of renewal resources gained further acceptance through the retention of our elephant population on Appendix II thus allowing us to locally trade in some of the elephant products, notably meat and skins'. It is unclear what Zimbabwe meant by 'local trade' - if it meant trade within its own borders, this could hardly be seen as contentious. Zimbabwe went on to suggest that, 'in an attempt to improve the management of our elephant populations', it was 'currently engaged in the development of Transfrontier Conservation Areas with its neighbours' as a way to promote 'inter-state cooperation in the management and sustainable use of ecosystems that transcend national boundaries with the aim of increasing economic benefits to their populations'.⁵²⁴ Zimbabwe did not mention whales or whaling in its Opening Statement; obviously assuming that the linkage would be obvious to all.

In its written Opening Statement, Japan made the strong allegation that 'only a personal appeal by the Chairman of the IWC and his strong assurance that completing of the RMS was imminent saved the IWC from being abandoned by the recent COP 11 of CITES. Even so, a majority of countries voted to downlist minke whales'.⁵²⁵ Japan then accused Australia of 'double standards' and suggested that if minke whales were to be renamed 'the kangaroos of the sea' the Australian public might support their use; and asked how a 'country that argues it should be allowed to emit more greenhouse gases' can 'object to the sustainable use of whale resources'.⁵²⁶

3.3.8 IWC 53, 2001

At IWC 53 in 2001, Iceland sought to rejoin the IWC. However, what caused controversy was that Iceland sought to rejoin with its instrument of adherence being made expressly conditional on a reservation to the commercial whaling moratorium, as found in paragraph 10(e) of the Schedule to the ICRW.⁵²⁷ Iceland explained that it had withdrawn in 1992 because

⁵²³ Switzerland Commissioner; *ibid* at 120-121. Monaco's Commissioner, on the other hand, said that '[w]e wish to express our growing unease with the notes, messages and even faxes of displeasure expressed by certain organisations towards IWC. We feel that such expressions are totally inappropriate. They represent undue interference in the business which is that of our Commission and they tend to indicate that the image, we have an image perhaps of weakness, and we should not certainly bow to such pressure'. Monaco Commissioner; *ibid* at 121. Also at IWC 52 a written Opening Statement was presented by the Republic of Guinea; in which the country suggested that it had opted to become a member as it was a member of the FAO, its Fisheries Committee (COFI) and of UNCLOS, and was '[l]oyal to the principles that are the foundation of these different instruments and aware of the role of cooperation concerning management of marine resources'. IWC 'Opening Statements of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide); written Opening Statement by: Republic of Guinea (IWC/52/OS/GUI).

⁵²⁴ *Ibid*; written Opening Statement by: Zimbabwe (IWC/52/OS/ZIM).

⁵²⁵ *Ibid*; written Opening Statement by: Japan (IWC/52/OS/JAP).

⁵²⁶ *Ibid*.

⁵²⁷ IWC 'Chairman's Report of the Fifty-Third Annual Meeting' (23-27 July 2001, London) at 5.

it had believed that the IWC ‘was no longer operating in accordance with the Convention and had become a non-whaling commission rather than a whaling commission’. Iceland, however, now felt that there were signs within the IWC of support increasing for sustainable whaling; and that Iceland had, therefore, rejoined in order to ‘have an influence on the discussions taking place’. Iceland claimed that it had the right under international law to adhere with a reservation.⁵²⁸ After complicated procedural arguments for and against Iceland’s contention, the country was not permitted to adhere with a reservation.⁵²⁹

At IWC 53 in 2001, Germany, with Austria, Italy, New Zealand, the US and the UK, proposed a Resolution on Commercial Whaling regarding on-going whaling occurring despite the moratorium. *Inter alia*, Germany noted that Norway has ‘decided to resume international trade’ in minke whales; despite minke whales ‘being listed on Appendix I of CITES’. Norway, in response, described it as ‘unacceptable’ that the Resolution sponsors did not respect Norway’s ‘right under international law to lodge reservations’, even where making such reservations is specified as a right as in both CITES and the ICRW. Norway asked that the proposed Resolution be withdrawn - this call being supported by Iceland, Antigua and Barbuda, Grenada, Dominica, the Russian Federation and Japan. The US then ‘recalled’ that Norway had continued commercial whaling despite similar Resolutions in the past - and that Norway’s present indication that it would re-open trade in whale products was ‘contrary to the moratorium and to CITES’. The UK pointed out that Norway’s proposal at CITES COP 11 to downlist certain whale species had not been adopted. Voted upon, the Resolution received 21 votes for, and 15 against, with one abstention.⁵³⁰

In its written Opening Statement, Norway advised that it found it ‘highly surprising and unacceptable that Germany, and its co-sponsors, do not seem to respect international law and a country’s right to lodge relevant reservations *even* where such action is clearly expressed as a specific right, as it is in CITES and the IWC. It is specifically disturbing that Germany proposes a resolution against another country exercising such rights, as long as it has lodged 7 reservations itself under CITES’. ‘Norway’, the Statement went on to record, ‘has not used its right to issue export permits for minke whale products since 1988’; and to argue that ‘[a] majority of the Parties to CITES do respect the fact that the two stocks of minke whales we have proposed for downlisting to Appendix II are *not* threatened with extinction, which is a legal and scientific prerequisite for listing on Appendix I, and have supported Norway at the last 2 COPS of CITES’.⁵³¹

With regard to CITES and ‘the need to improve mechanisms for the transfer of scientific samples between countries’, the Scientific Committee urged member nations at IWC 53 to ‘consider nominating certain “centres” to be given institutional CITES permits to facilitate the import and export process’.⁵³²

⁵²⁸ *Ibid* at 5.

⁵²⁹ While the matter is important for understanding recent IWC politics, space constraints have led to the excision of this discussion from the main text of the present thesis. See [Annex C](#).

⁵³⁰ IWC ‘Chairman’s Report of the Fifty-Third Annual Meeting’ (23-27 July 2001, London) at 27-28.

⁵³¹ IWC ‘Statements of the Fifty-Third Annual Meeting’ (23-27 July 2001, London); written Statement by: Norway (IWC/53/44 Agenda Item 9.2).

⁵³² IWC ‘Chairman’s Report of the Fifty-Third Annual Meeting’ (23-27 July 2001, London) at 34.

3.3.9 IWC 54, 2002

In May 2002, the IWC held its 54th annual meeting. The host country was Japan, and the port city from which the whaling fleets leave - Shimonoseki - was chosen as the venue. The meeting witnessed some of the most determined efforts yet made to resume commercial whaling - according to the Japan Whaling Association, the meeting closed 'with its stalemate remaining but pro-whaling groups gaining steady ground in voting'.⁵³³

The most important aspect of IWC 54 concerned the US/Russian quota for bowhead whales for Aboriginal Subsistence Whaling - this matter is discussed elsewhere in this thesis.⁵³⁴

At IWC 54 Iceland again deposited an instrument of adherence - with a reservation. Iceland stated that it now regarded itself as a member of the IWC, despite the events and the Chair's ruling of the previous year.⁵³⁵ After argument as complicated as the previous year, Iceland was again not admitted.⁵³⁶

At IWC 54, while discussing the aboriginal quota in Greenland, the UK raised concerns about 'the practice of whale products being exported to Denmark from Greenland'; believing that the practice 'contradicted the philosophy that aboriginal subsistence products must be consumed locally'. Denmark, however, explained that the practice in 'in accordance with CITES' and 'is considered a transfer within the Kingdom of Denmark, not an export'. The UK responded by expressing concern at the precedent that might be set.⁵³⁷ Later in the meeting, the UK did argue that, only a few days before, the Environmental Investigation Agency 'had purchased a package of whale meat in Nagasaki labelled as coming from Greenland'. The Danish Commissioner and a representative of Greenland's Government, however, referred to CITES regulations in arguing that it was 'extremely unlikely that the product came from Greenland'.⁵³⁸

Norway 'recalled' the 2001 suggestion that the IWC would be able to report to the next CITES meeting (in 2002) that the RMS had been completed; describing the suggestion as having been 'too optimistic'. Norway then argued that the IWC's report to CITES in 2002 ought to 'give a true picture of the status of discussions on the RMS'.⁵³⁹

In its written Opening Statement, South Africa suggested that it, as a developing country, had 'the responsibility to debate on issues that affect the developing world, and Africa in particular'; and that in 'this case, it would be the management and conservation of whales with emphasis on the management and development of whale-watching'. South Africa, the Statement continued, 'as a developing nation, supports the principle of sustainable utilisation,

⁵³³ 'Pro-whaling voices gain firmer ground' *JWA News* No.1, July 2002, http://www.whaling.jp/english/news/0207_01.html. For a more detailed description of significant events in Shimonoseki, see [10](#) on aboriginal whaling.

⁵³⁴ See [10](#).

⁵³⁵ IWC 'Chairman's Report of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki) at 5-6.

⁵³⁶ *Ibid* at 7. Again, the bulk of this argument has been excised from the present thesis. See [Annex C](#).

⁵³⁷ *Ibid* at 17.

⁵³⁸ *Ibid* at 22-23.

⁵³⁹ *Ibid* at 40.

incorporating both the concepts of consumptive and non-consumptive use'.⁵⁴⁰ Cynically, one *could* suggest that South Africa therefore wants to have its cake and eat it too - picking and choosing its types of use.

Norway, in its written Opening Statement, tried to lay down the gauntlet; declaring that 'the IWC stands at a crossroads. We have reached a point where basic issues can no longer be dodged. ... Norway's position is crystal clear - we want the IWC to function in accordance with the principles and objectives laid down in the 1946 Convention'. Norway then suggested that it also wanted to 'see the IWC function in conformity with other contemporary, over-reaching international mechanisms pertaining to environment conservation and resource management'; and that special note should be taken in this regard of the 1992 Convention on Biological Diversity, and of the 1982 UN Law of the Sea Convention, both of which, according to Norway, 'have served to further entrench the twin principles of conservation and sustainable use of Nature's resources'. Norway concluded by warning that it saw a 'grave danger that undermining the principle of sustainability in the IWC will serve to undermine that principle within the whole structure of international cooperation on environment conservation and resource management'. According to the Statement, Norway 'sees the developments in the IWC as a test case in defending and consolidating these basic principles'; and that this is why the country has 'chosen to continue to work within the IWC with these considerations in mind, - still hopeful and optimistic that the IWC will decide to join this effort'.⁵⁴¹

Along similar lines to Norway, Japan, in its written Opening Statement at IWC 54, said that Japan's 'primary interest is to bring the work of the [IWC] back to the task mandated by its parent treaty'; and that the ICRW requires that 'regulations with respect to the conservation and utilization of whale resources must be based on scientific findings'.⁵⁴²

Kenya, in its written Opening Statement at IWC 54, stated that '[o]ur policy on non-consumptive use of wildlife is well known'. Kenya then explained that taking this position 'has significantly boosted our social and economic development over the years, as Kenya's economy is largely dependent upon tourism, which is the leading foreign exchange earner and the only developing sector over the last three years'.⁵⁴³ One thing that is noticeable about Kenya's stance is that it is consistent - the country's policy on whaling is echoed in its policy on use of elephants and indeed most other wildlife.

3.3.10 The 5th Special Meeting of the IWC, 2002

The 5th Special intersessional Meeting was held on 14 October 2002, in Cambridge. The Meeting was held at the request of the US and the Russian Federation, in order to repeat their request for a Schedule amendment to allow for the granting of an aboriginal subsistence take of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. Again, there was controversy over Iceland which had, on 10 October, deposited an instrument of adherence with the US (as depositary government). Again, the reservation to the moratorium was an integral part of the instrument; however, Iceland had made a concession by committing not to

⁵⁴⁰ *Ibid*; written Opening Statement by: South Africa (IWC/54/OS/SOU).

⁵⁴¹ *Ibid*; written Opening Statement by: Norway (IWC/54/OS/NOR).

⁵⁴² *Ibid*; written Opening Statement by: Japan (IWC/54/OS/JAP).

⁵⁴³ *Ibid*; written Opening Statement by: Kenya (IWC/54/OS/KEN). See 9.3.

authorise whaling 'for commercial purposes by Icelandic vessels before 2006'. The Chair decided that, as in previous years, it should first be decided whether or not the Commission has the competence to decide the issue; before, secondly, deciding whether or not to allow adherence with a reservation. After much debate, and several votes, Iceland was permitted to rejoin - with a reservation.⁵⁴⁴

The Agenda for the Special Meeting saw consideration both of a Schedule amendment in respect of the aboriginal subsistence hunt in the Bering-Chukchi-Beaufort bowhead whale stock; and of an item on Japanese coastal whaling. In an Introductory Statement, the Commissioner for the Russian Federation put the position in emotional terms; arguing that '[i]n order to save time the Russian delegation requests that this meeting should not discuss the USA-Russian proposal but accept it on the basis of consensus, and that distinguished members of delegations take the floor only if they do not agree to the possibility of a consensus on the question of whether people should eat or starve'.⁵⁴⁵

The Russian Commissioner advised also that in September 2002 a Japanese delegation had visited Chukotka; and that this delegation had seen for itself that 'there are no fruit growing in the north of my country' and that 'the whaling season is going to start in the Spring so the peoples of Chukotka cannot wait for the Berlin session' of the IWC in June 2003. Further, he announced that the Russian Federation had reached with Japan a shared understanding ... in regard to joint scientific research and technical assistance from Japan to the whalers of Chukotka'; which would 'be used to make bowhead harvesting even more successful'.⁵⁴⁶

The Russian Federation and the US then proposed that a five year quota of up to 280 for bowhead whales from the Bering-Chukchi-Beaufort Seas stock be approved, until and including the year 2007; with up to 67 strikes each year, except that up to 15 strikes might be carried over each year. The proposal also suggested that the provision be reviewed annually by the Commission, in light of the advice of the Scientific Committee.⁵⁴⁷

In debate, Japan indicated that it 'recognised the commitment of the US to review the provision on an annual basis and to abide by the advice of the Scientific Committee'; these features being what distinguished the proposal from the proposal at IWC 54 in Shimonoseki. Japan indicated that while it appreciated the US's response, it did not feel that all of the questions Japan had raised at Shimonoseki to have been addressed. Nevertheless, Japan, although not able to join the proposed amendment, would not block consensus on the amendment.⁵⁴⁸ Norway also indicated that it would 'support the consensus adoption of the proposed Schedule amendment'; while recalling its stance that 'the Convention does not recognise the concept of aboriginal subsistence whaling' and that Norway considers the Commission's practice of 'distinguishing between commercial and subsistence whaling' to be 'artificial, illogical and morally wrong'.⁵⁴⁹

⁵⁴⁴ IWC 'Chairman's Report of the 5th Special Meeting' (14 October 2002, Cambridge) at 139-142.

⁵⁴⁵ IWC 'Chairman's Report of the 5th Special Meeting' (14 October 2002, Cambridge) at 143. See [Annex C](#); and (n 1703).

⁵⁴⁶ *Ibid* at 143.

⁵⁴⁷ *Ibid* at 143.

⁵⁴⁸ *Ibid* at 143.

⁵⁴⁹ *Ibid* at 144.

Following the addition of a sub-paragraph proposed by Antigua and Barbuda, the proposed Schedule amendment was adopted by consensus. The sub-paragraph added read as follows: '[t]he findings and recommendations of the Scientific Committee's in-depth assessment for 2004 shall be binding on the parties involved and they shall modify the hunt accordingly'.⁵⁵⁰

Japan then put forward a draft Resolution requesting an interim relief allocation of 50 minke whales for its four community-based whaling communities; which request, according to Japan, 'had been denied for the last 15 years'.⁵⁵¹ The draft Resolution would clearly not, by itself, have seen the allocation of a minke whale quota to the four Japanese communities - but as a symbolic step towards such allocation it would have had huge importance.

Japan then advised that it 'considered that it had made a big effort to break the impasse on this issue', noted the delicate balance within which the work had been done, and requested that the Resolution be adopted by consensus.⁵⁵² Countries which supported Japan's proposal included Norway, Denmark, the Rep of Guinea, the Russian Federation, Antigua and Barbuda, the Rep of Palau, Morocco, Benin, Iceland, Solomon Islands, St Kitts and Nevis, St Lucia, China - and, in a major turnaround, the United States. The US advised that it was able to support the Resolution as two of its major concerns had been addressed; that Japan satisfy the provisions of paragraph 10(e) of the Schedule, and that the Scientific Committee must advise that the 'catch from this stock of minke whales is sustainable' (the latter being a sub-paragraph added to Japan's draft Resolution for the first time). The US then advised that it considered Japan's draft Resolution to show 'a marked change and a positive movement towards presenting a proposal acceptable to a broad range of the Commission'.⁵⁵³ One must be somewhat cynical, of course. While countries continued to phrase their comments to seem consistent with their usual positions, it was very clear that deals had been concluded behind the scenes.

Countries like Mexico, Germany, the UK, Austria, Australia, New Zealand, Brazil, Italy, Sweden and Switzerland, however, advised that they were not able to support the draft Resolution; considering that the proposal was inconsistent with paragraph 10(e), establishes (*de facto*) a new category of whaling, and that it prejudged decisions made at IWC 55. The UK added that it considered the 'only quota consistent with paragraph 10(e)' to be zero. New Zealand considered that the commercial aspects of Japanese coastal whaling, which had been objected to previously, had not been addressed by Japan's efforts. Ireland suggested that it would not agree to change paragraph 10(e) 'before a satisfactory RMS' had been adopted. Antigua and Barbuda, on the other hand, suggested that it was 'remiss of the Commission not to deal fairly with Japan's Resolution'; and that it believed that 'double standards were again

⁵⁵⁰ *Ibid* at 144.

⁵⁵¹ The draft Resolution contained the following:

... THE COMMISSION: REAFFIRMS the Commission's commitment to work expeditiously to alleviate the distress caused by the cessation of minke whaling to the communities of Taiji, Wada, Ayukawa and Abashiri and AGREES that the most effective way of doing so would be to establish as soon as possible an appropriate catch quota for minke whales consistent with paragraph 10(e) of the Schedule; ... DECIDES that the establishment of an appropriate catch quota for minke whales for the four community-based whaling communities should be based on scientific advice of the Scientific Committee that such quota is sustainable; and FURTHER DECIDES that an appropriate amendment to the Schedule and an Action Plan to establish an appropriate catch quota of minke whales exclusively for the communities of Taiji, Wada, Ayukawa and Abashiri be considered at the 55th Annual Meeting of the [IWC].

IWC Document. 'Draft Resolution on Japanese Community-Based Whaling' IWC/SPEC.02/4 11 October 2002. The quoted section is an extract from the draft Resolution, not the whole.

⁵⁵² *Ibid* at 144.

⁵⁵³ *Ibid* at 144-145.

being employed'. The Solomon Islands agreed. On being put to the vote, however, there were 16 votes for, 19 against, and two abstentions.⁵⁵⁴ As will be discussed later,⁵⁵⁵ perhaps the most interesting aspect of this vote is that the US voted in favour - after more than a decade of firm opposition to such a proposal. The observer is entitled at least to raise an eyebrow.

3.3.11 IWC 55, 2003

Komatsu, writing in January 2003, suggested that '[t]wenty years have passed since whales were given protection from commercial whaling. In this time, many species of whales have increased to the point where the balance of the ocean ecosystem has become skewed'. We must now, he continued, 'call for the protection based on the sustainable use of balanced resource alignments in the ecosystem. Japan will seize the opportunity to call for the need of sustainable utilization of whale resources based on this principle at the ... IWC in Berlin in June, 2003'.⁵⁵⁶ This may be the intention with which Japan began the year 2003, but their plans were to be blown out of the water.

Nicaragua made its first ever appearance at the IWC in 2003; and gave a verbal Opening Statement in which it 'noted' that the management of whales is 'inter-related with, and important to' fisheries management, and therefore that it is 'vital that developing nations dependent upon fishery resources participate in the work of the IWC'. Nicaragua suggested that in recent years attention has been diverted away from whale management and toward 'issues better carried out by others'; and specifically suggested that 'trade in whale products is the function of CITES'.⁵⁵⁷ Belize also adhered to the ICRW; in Belize's case, this being a re-adherence. In its verbal Opening Statement, Belize stated that 'in the same spirit as it joined the IWC in 1982 to support the moratorium, it was now rejoining committed to conservation and the principles of sustainable use'.⁵⁵⁸ It is interesting, and useful, to note that a number of countries have in recent years switched their stances in this way. Arguably, sustainable use is becoming the dominant philosophy worldwide.

Mexico's draft Resolution, entitled '[t]he Berlin Initiative on strengthening the conservation agenda of the [IWC]',⁵⁵⁹ proposed, *inter alia*, the establishment of 'a Conservation Committee of the [IWC], composed of all Contracting Parties'; with the Commission entrusting to this Committee the power, essentially, to prepare and recommend, on an ongoing basis, a conservation agenda to the Commission. Mexico argued that 'there is a conservation agenda to be discussed and examined within the IWC'. The Initiative envisaged, per Mexico, the creation by the IWC of a dedicated conservation committee designed to investigate and address various threats to whales, such as over-fishing, climate change, toxic contamination,

⁵⁵⁴ *Ibid* at 145. The countries which voted in favour were Antigua and Barbuda, Benin, PR of China, Denmark, Dominica, Grenada, Rep of Guinea, Iceland, Japan, Norway, Palau, Russian Federation, St Kitts and Nevis, St Lucia, Solomon Islands, and the US. Voting against were Australia, Austria, Brazil, Chile, Finland, France, Germany, Italy, Mexico, Monaco, the Netherlands, New Zealand, Peru, Portugal, San Marino, Spain, Sweden, Switzerland, and the UK. Ireland and the Rep of Korea abstained. IWC voting record: Resolution no. 5, Japan proposal, IWC/SPEC.02/4.

⁵⁵⁵ See 10 generally; esp. 10.2.4.

⁵⁵⁶ M Komatsu & S Misaki 'Foreword' in *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 8.

⁵⁵⁷ IWC 'Chairman's Report of the Fifty-Fifth Annual Meeting' (16-19 June 2003, Berlin) at 5.

⁵⁵⁸ *Ibid* at 5.

⁵⁵⁹ Co-sponsors were Australia, Austria, Brazil, Finland, France, Germany, Ireland, Italy, Kenya, Mexico, Monaco, the Netherlands, New Zealand, Portugal, San Marino, South Africa, Spain, Sweden, the UK and the US.

undersea noise, shipping and accidental catches.⁵⁶⁰ Mexico argued that the draft Resolution was not, as suggested by Japan prior to the meeting, an ‘attempt to change the fundamental purpose of the whaling treaty by introducing a strategy to end all sustainable use of whale resource for food’; but rather that the Resolution was being proposed ‘simply to provide the institutional structure needed to take account of conservation issues within the IWC’. Mexico noted further that the draft Resolution was not an attempt to change the ICRW or to override the Scientific Committee.⁵⁶¹ To an extent, those who argued in support of adoption of the Resolution argued for linkages and an ‘ecosystem approach’ to management; Sweden, for instance, noting that ‘conservation issues are not just linked to questions of sustainable use, since various forms of degradation and fisheries practices are threatening the world’s whale populations’.⁵⁶² On an interesting note, Monaco ‘pleaded for consistency in countries’ attitudes to conservation’; suggesting that it ‘did not see the sense of Contracting Governments voting for conservation in other *fora* and against it at IWC’.⁵⁶³ The US argued that the draft Resolution ‘did not undermine its commitment to the management principle within the IWC;’ and that it did not believe that the draft Resolution was inherently anti-whaling.⁵⁶⁴ Finland then advised that ‘whale conservation had been its main objective’ since 1983; but explained that it ‘had never said that there could not be controlled sustainable commercial whaling’ once an ‘acceptable management system’ had been put in place.⁵⁶⁵ Brazil argued that ‘it fully embraces the concept of sustainable use of natural resources’; but explained that ‘direct harvest’ is not, in its view, the ‘only option for sustainable use’. Brazil argued that more needed to be considered than the setting of quotas; and that ‘to vote against the draft Resolution would be to deny the conservation principle’.⁵⁶⁶ South Africa suggested that ‘the proposals in the draft Resolution worked in favour of developing countries that could benefit from whalewatching and tourism’.⁵⁶⁷ Ireland advised that it considered the ‘development of the RMS to be in a state of paralysis’; and that adoption of the draft Resolution ‘would help drive the work of the Commission forward’.⁵⁶⁸

One important point to note here is that the anti-whaling countries shifted the terms of the debate somewhat; by ‘regaining control’, in a sense, of the word ‘conservation’. In the present thesis, however, the writer will continue generally to use the word in its sense of sustainable use, as opposed to ‘preservation’.

On South Africa, it appears from its statements at this and previous Meetings that its line is that it does believe in sustainable use - but that in respect of whales the type of use which it believes in is whalewatching. Arguably, this could be seen as somewhat disingenuous as it

⁵⁶⁰ See, for example, ‘Whaling Commission authorises global conservation’ <http://ens-news/ens/jun2003/2003-06-16-01.asp>. As suggested by Burns and Wandesforde-Smith, writing in 2002, ‘[e]nvironmental change may ultimately prove to be the gravest peril posed to cetaceans during this century and beyond. Ultimately, it is difficult to be sanguine about the prospects IWC has in order to meaningfully address these threats. At the fiftieth meeting, the parties allocated less than US\$200 000 to address the major environmental threats faced by cetaceans’. W C G Burns & G Wandesforde-Smith ‘The International Whaling Commission and the Future of Cetaceans in a Changing World’ (2002) 11:2 *RECIEL* 199 at 209.

⁵⁶¹ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 7.

⁵⁶² *Ibid* at 8.

⁵⁶³ *Ibid* at 8.

⁵⁶⁴ *Ibid* at 8.

⁵⁶⁵ *Ibid* at 8.

⁵⁶⁶ *Ibid* at 8.

⁵⁶⁷ *Ibid* at 8.

⁵⁶⁸ *Ibid* at 8. See 3.3.1 and 8.1.

enables South Africa to maintain its philosophy of use in respect of natural resources; and at the same time to remain where it appears to want to remain politically, in the anti-whaling bloc.⁵⁶⁹

On the other side of the debate, Denmark queried the legality of the draft Resolution on procedural grounds, as it would be using a (majority vote) Resolution to amend the Schedule; the country then suggested that the priority should be to complete the RMS.⁵⁷⁰ Iceland ‘noted’ that it is a supporter of ‘whale conservation’ and believed in sustainable whaling; but that it felt the draft Resolution to be ‘hi-jacking the terms of the Convention by selective quotation from its preamble’ and that it would have the effect of drawing ‘attention away from work on the RMS’ and would ‘increase polarisation in the IWC’.⁵⁷¹ Norway, likewise, expressed the belief that the ‘Berlin Initiative’ would ‘aggravate’ the present imbalance in the IWC, in terms of which the ‘orderly development of the whaling industry’ was given insufficient weight; and that a ‘radical and lasting change in the character of the IWC’ would be created. Norway argued that the proper way to achieve such a result would be ‘a diplomatic conference to renegotiate the Convention’; and that this course, which it recognised not to be ‘feasible’, would be ‘circumvent[ed]’ by the Initiative.⁵⁷² China argued that it ‘did not see the need for a Conservation Committee’; as the 1982 moratorium was itself a ‘significant conservation measure’.⁵⁷³ Of interest is the suggestion, by the Russian Federation, that ‘whale conservation could be given high priority under the framework of the Convention on Biological Diversity (CBD)’.⁵⁷⁴ Japan stated that it ‘believed the draft Resolution to be contrary to the primary objective’ of the ICRW; and, noting that ‘about half of the Commission appeared strongly opposed to the draft Resolution,’ questioned how it might be able to ‘function properly’.⁵⁷⁵

3.3.12 Whaling in 2003; and the Berlin Initiative

Andresen writes that as changing the purpose of the ICRW would demand the consent of all parties, it is clearly not attainable. The result of such an attempt would probably be that the pro-whaling nations would leave and try to set up an alternative to the IWC. For this reason, the majority prefers to continue to live with ‘the present seemingly schizophrenic situation: to prevent commercial whaling within a legal framework that demands the parties secure an orderly development [of] the whaling industry’.⁵⁷⁶

However, in 2003 it seems that an attempt *was* made to change at least certain focal aspects of the IWC’s role. The Berlin Initiative, which created a Conservation Committee of the IWC, was driven by non-governmental environmental organisations and proved extremely divisive of the States parties. Reactions to the vote from both camps were equally opposed. ‘This is a big leap forward and has put conservation at the heart of the role of the IWC’, according to

⁵⁶⁹ See 13 generally.

⁵⁷⁰ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 8-9.

⁵⁷¹ *Ibid* at 9.

⁵⁷² *Ibid* at 9.

⁵⁷³ *Ibid* at 9.

⁵⁷⁴ *Ibid* at 9. On this, however, Mexico responded that it did not believe that this would be an ‘appropriate alternative since the CBD does not have competency over cetaceans, unlike the IWC’; and that not all IWC members are party to the CBD.

Ibid at 10. See 15 generally.

⁵⁷⁵ *Ibid* at 9.

⁵⁷⁶ S Andresen ‘The Whaling Regime: “Good” Institutions but “Bad” politics?’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 244.

Matthew Davis, communications director of the World Wildlife Fund International Species Program.⁵⁷⁷ According to Dr Chris Tuite, director of wildlife and habitat with the International Fund for Animal Welfare (IFAW), '[w]hat was once a whalers' club has become a force for conservation'.⁵⁷⁸ According to Australia's Environment Minister, Dr David Kemp, '[t]he Initiative recognises that the primary objective of the IWC is to conserve whale populations for the benefit of all humankind and for future generations'.⁵⁷⁹

In contrast, according to Joji Morishita, spokesman for the Japanese delegation to the IWC, the '... Initiative is a Trojan horse. It looks harmless from the outside, but is actually destroying the IWC'.⁵⁸⁰ According to Stefan Asmundsson, Iceland's representative, '[w]e have witnessed the concept of conservation being hijacked by protectionists. Conservation is a means to enable sustainable whaling. This proposal was not about conservation but protectionism and animal rights'.⁵⁸¹ Clearly, the battle is over preservation and conservation and the meanings of these words - and over different philosophies of natural resource use.

In its written Opening Statement, Australia suggested that it was 'with a sense of history' that it welcomed the Berlin Initiative; and that it was proud to co-sponsor it. Australia suggested that the Initiative 'is a formal recognition of the reality that our Commission has evolved. It has evolved from an organisation that primarily attempted to manage the whaling industry, to an organisation that focuses its expertise on how best to conserve the marine biodiversity that this industry massively over-exploited'. Australia then went on to explain that it opposed 'the resumption of commercial whaling and the completion of any RMS that would make that possible - because of the cruelty and distress involved, and because it is not required to meet human needs'. Australia added that the moratorium 'must continue in order to meet the IWC's key responsibility to ensure that whale stocks are given every opportunity' to recover; and warned that the 'lack of consensus of the details', between the countries which desired completion of the RMS, 'appears to us to invite a return to unregulated whaling'.⁵⁸² Norway, on the other hand, in its written Opening Statement, argued that the 'IWC was *not* established in order to obstruct, strangle and ultimately liquidate the whaling industry. It was *not* established in order to undermine the principles of conservation and sustainable use ... Nevertheless, ... the Commission has turned into an instrument for activists seeking to *prohibit* whaling!'.⁵⁸³

In June it was reported that 17 member countries of the [IWC] issued a statement that, as described by the High-North Alliance, said that:

[w]e are deeply concerned that adoption of the Berlin Initiative which establishes a conservation committee will essentially destroy the already polarized and dysfunctional IWC'. They consider this 'an attempt to change the fundamental objectives' and 'an attempt to subvert the purpose' of the organisation. 'The 'Berlin Initiative', together with the lack of progress in completing the Revised

⁵⁷⁷ O Pohl 'About-face by whaling commission' 17 June 2003; <http://www.theage.com.au/articles/2003/06/17/1055828326653.html>.

⁵⁷⁸ 'Whaling Commission authorises global conservation' 16 June 2003; <http://ens-news/ens/jun2003/2003-06-16-01.asp>.

⁵⁷⁹ O Pohl 'About-face by whaling commission' 17 June 2003

<http://www.theage.com.au/articles/2003/06/17/1055828326653.html>.

⁵⁸⁰ *Ibid.*

⁵⁸¹ 'Whaling Commission authorises global conservation' 16 June 2003; <http://ens-news/ens/jun2003/2003-06-16-01.asp>

⁵⁸² IWC 'Opening Statements of the Fifty-Fifth Annual Meeting' (16-19 June 2003, Berlin); written Opening Statement by: Australia (IWC/55/OS/AUS).

⁵⁸³ *Ibid.*; written Opening Statement by: Norway (IWC/55/OS/NOR).

Management Scheme for the resumption of commercial whaling, has provoked an increased interest in examination of alternatives that would provide for the sustainable use of abundant whale resources,' concludes the statement. The statement was signed by the Commissioners from Antigua and Barbuda, Benin, Dominica, Gabon, Grenada, Republic of Guinea, Iceland, Japan, Mongolia, Norway, Palau, Panama, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal and Solomon Islands. ... Japan's Whaling Commissioner said in a press release issued today: '[w]e are particularly unhappy at the attitude of the US delegation. After receiving their quota for bowhead whales at the special meeting of the Commission last October they have resumed an excessively strong position against Japan's reasonable proposal for whaling to satisfy the needs of our coastal communities and our research programmes that continue to provide valuable scientific information'. ... Matthias Berninger, Germany's deputy minister of consumer protection, food and agriculture, told a press briefing today that Germany was more than pleased with the outcome of the meeting. He also informed that Germany will attempt to recruit new members into the IWC, in particular the Eastern European countries that are joining the European Union next year. The deputy minister thus hopes to maintain the anti-whaling majority of nations in the organisation.⁵⁸⁴

It had clearly, therefore, not gone unnoticed that the US had switched its stance on Japanese coastal whaling for the Special Meeting in 2002.

According to the Japan Whaling Association, Japan 'strongly opposed' the Berlin Initiative on the grounds that 'any resolution solely aimed at protection goes against the objectives' of the ICRW; and that, secondly, 'the IWC should not be polarized with the forceful adoption of the resolution despite the opposition of about half of the members'. Japan also asserted that 'if such a committee is to be established, the notion of sustainable use should be clearly incorporated in its mandate'.⁵⁸⁵

From the same source, Japan 'expressed its profound regret in that the resolution would transform the IWC into an organisation totally focused on the protection of cetaceans. Japan reserved its position on participation in the committee's meetings and making financial contribution[s]'.⁵⁸⁶

It would seem, however, with hindsight, that the Berlin Initiative has not had much impact in the subsequent years - and in fact has not changed the IWC, or not significantly. At the same time, though, the divide between the protagonists in the International Whaling Commission can seldom have appeared wider.

The UK raised again the issue of the whale meat bought in Japan, but which had been 'labelled as coming from Greenland and the Russian Federation'. The governments of Denmark, the Russian Federation and Japan had investigated; with the samples being divided for two different sets of DNA analysis. The analysis by Japan had shown that the product labelled as coming from Greenland was in fact Antarctic minke whale, and the product labelled as coming from the Russian Federation was in fact Dall's porpoise. While stating that it did not doubt Japan's analysis'; the UK wished that Japan would arrange CITES permits for the second set of samples, which were stored at the US embassy in Tokyo, to be analysed outside Japan. Japan indicated that it had 'no intention of issuing CITES permits'; and the UK

⁵⁸⁴ 'End in sight for the IWC?' High North Alliance 19 June 2003; <http://www.highnorth.no/news/pfriend.asp?which=309> (accessed 29 May 2006).

⁵⁸⁵ 'Pro-use countries protest against IWC's protective leanings' *JWA News* No. 6, July 2003; http://www.whaling.jp/english/news/0307_01.html.

⁵⁸⁶ *Ibid.*

then indicated that it ‘would try to arrange for corroborative analysis to be done in Japan’. Norway and the Russian Federation both ‘noted’ that they considered that trade issues are not within the IWC’s competence; with the Russian Federation stating that it was ‘completely satisfied with Japan’s report’. The UK stated that it ‘did not agree with this view on competency’; and that it believed that such issues were of crucial value to any RMS.⁵⁸⁷

This incident does show rather ironic use by Japan of the provisions of CITES in order to refuse to cooperate with the UK’s demands. The usual position sees Japan arguing that CITES restrictions on trade in whale meat ought to be relaxed; and the UK arguing that they should be upheld. As is usual in international law and politics, international law appears here to have been used as a political tool.

Australia discussed an Opening Statement put forward by the IUCN; which Australia argued to be inappropriate as it ‘provided highly specific and tendentious advice to the Commission on how it should manage progress on the RMS’. Australia argued that it was ‘unusual’ for the Secretariat of one organisation to give such advice to another. This could be seen as somewhat ironic, given that Australia has supported the IWC advising CITES. Norway advised that the IUCN often does provide such advice, particularly to CITES; although Norway expressed a preference for the view of Australia.⁵⁸⁸ Norway probably was seeing things more clearly here than was Australia - Norway believing that the IWC should not dictate to CITES.

In October 2003, however, Nobutoshi Akao, Secretary General of the ASEAN-Japan Center, argued that - despite Japan’s veiled threats that it might leave the IWC - ‘Japan should neither secede from the International Whaling Commission nor suspend its financial contribution. Rather it should remain in the IWC and continue IWC-reforming efforts’.⁵⁸⁹ ‘Japan’s secession from the IWC’, Akao went on, ‘would mean that Japan would lose international opportunities to make its justifiable case and would be isolated internationally’. This could be a useful clue as to why Japan remains in the IWC.

Japan has perhaps learned from observing Iceland, which withdrew from the IWC, hoping to be able to exercise more authority from outside, but found this difficult and has since returned (as explained elsewhere).⁵⁹⁰ In addition, Japan has put too substantial an effort over the years into reforming the IWC to withdraw easily.

Friedheim asks ‘[w]hat kind of threat could be made that would be meaningful to the anti-whaling coalition?’. He suggests that ‘obviously, whaling proponents can always threaten to withdraw from the IWC’; and that ‘unrestricted whaling is not a credible threat, but the creation of a rival organization might be’.⁵⁹¹

⁵⁸⁷ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 15.

⁵⁸⁸ *Ibid* at 34.

⁵⁸⁹ ‘Japan Should Remain in the IWC and Continue Its Efforts to Reform It’ *JWA News* No.8, December 2003, http://www.whaling.jp/english/news/0312_03.html.

⁵⁹⁰ See 3.3.10 and Annex C.

⁵⁹¹ R L Friedheim ‘Negotiating in the IWC Environment’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 223. Friedheim adds that ‘[t]he North Atlantic Marine Mammal Commission (NAMMCO) was created partially as a threat, but it has been held on a very tight leash. It is possible to loosen the leash’. *Ibid* at 223. See 8.3 generally.

‘Japan’, said Akao ‘has long tried to draw other countries into its camp at the IWC and should continue such strenuous efforts’. In support of this, he writes, ‘[m]any developing countries endorse the principle of sustainable development, including especially Asian and African countries’. He then points out that Japan now has far more support within the IWC than it has had for a long time; and describes this as being ‘the fruit of Japan’s strenuous efforts to increase its allies. I would expect that Japan to reform the abnormal IWC from the inside’.⁵⁹²

This may explain, at least partly, the sudden surge of IWC membership. Oddly, this has led to some ironies. As Japan has played the numbers game, so have the anti-whaling states. The anti-whaling states appear even to have, for the present at least, won the race to acquire majority support. A second problem is that as pro-whaling states have sought to keep the IWC separate from other international environmental conventions, so the introduction of so many new states⁵⁹³ has made it less tenable to argue that the IWC is not inherently linked to other environmental conventions.

3.3.13 Further events in 2003

Further linkage of Oriental and African interests, and of the IWC and CITES, became apparent in October 2003, when it was reported that ‘[m]embers of the Sustainable Use Parliamentarians Union of Japan (SUPU-Japan), the Japanese chapter of SUPU, exchanged views on sustainable use of natural resources with delegates from African countries’. Apparently, ‘[i]n his welcome speech [to representatives from 20 African countries], [Chairman Yutaka] Takeyama [member of the House of Councillors] observed that excessive emphasis is now given only to protection of natural resources, under pressures from radical environmental organizations, at the sacrifice of effective utilization of the resources, as is observed at the meetings of the [IWC] and the [CITES]’.⁵⁹⁴

3.3.14 The lead-up to the IWC Meeting

Accusations of Japanese vote-buying mounted in 2004. In April, however, it was reported that ‘[s]maller Caribbean Community (Caricom) member-states involved in whaling put up a strong defense of their pro-whaling stance and have invited the larger territories - Trinidad and Tobago, Jamaica and Guyana - to join them at the international level in promoting and defending the sustainable use of the region’s renewable marine and wildlife resources’.⁵⁹⁵ According to the same report, Dominica’s Commissioner to the IWC ‘took issue with those who accuse the islands of only being there for the sake of Japanese aid’. He said that ‘[w]e have had to bear insults, even being called ‘Japanese lap dogs’ by certain NGOs at the IWC’s 55th annual meeting in Berlin last year. But the reality of the matter is that Japan is the only one of the developed countries that’s living up to its pledge at the Earth Summit in Rio in

⁵⁹² ‘Japan Should Remain in the IWC and Continue Its Efforts to Reform It’ *JWA News* No.8, December 2003, http://www.whaling.jp/english/news/0312_03.html.

⁵⁹³ See 16 generally.

⁵⁹⁴ ‘SUPU-Japan Invites African States to join the Union for Sustainable Use’ *JWA News* No.8, December 2003; http://www.whaling.jp/english/news/0312_01.html.

⁵⁹⁵ ‘Caribbean States Defend Whaling Stance at Regional Sustainable Use Conference’ *JWA News* No.9, April 2004; http://www.whaling.jp/english/news/0404_01.html (accessed 7 June 2006). See 16.

1992 to commit 0.7% of its budget to the cause of helping developing countries in the area of sustainable use of their renewable resources'.⁵⁹⁶

In advance of the IWC meeting in July, Japan warned again that it 'may quit the commission if it doesn't get results', with the comment that '[w]e may have to consider pulling out, but we will have to see how the meeting goes' being made by Akira Nakamae, an alternate member of the Japanese delegation [to] Sorrento, Italy'; but he apparently added that '[w]e see that as a last resort, however'.⁵⁹⁷ Despite the occasional bit of sabre-rattling, it appears clearly that Japan does not *want* to pull out of the IWC. This can arguably be seen as a hopeful sign for international law and cooperation.

3.3.15 IWC 56, 2004

The IWC met from 19-22 July in Sorrento, Italy. On Day 1, the Chair welcomed six new Contracting Governments which had adhered since the last Meeting: Mauritania; Hungary; Tuvalu; Côte d'Ivoire; Belgium; and Suriname. The Chair invited the new member countries to address the meeting; in other words, to give opening statements.

Mauritania noted that it had a coastline of over 700km, and fishing generates more than 50% of export income and 25% of budgetary income. Its strategy for the exploitation of marine fishery resources is based on their sustainable use, but it also supports the protection of endangered marine species. It noted further that it will base its decisions on science and, where insufficient data are available, on the application of the precautionary principle.⁵⁹⁸ Mauretania, in its written Opening Statement, stated that its 'fishing policy is based on the principle that fishing resources are a heritage that present generations must use in a rational and sustainable manner in such a way that they are left to future generations as a legacy in acceptable conditions, so they in turn are able to carry on by doing the same'.⁵⁹⁹

A noticeable trend in Opening Statements is the commitment to decisions based on proper science. Ironically, of course, many of the countries which make this undertaking are developing countries with little scientific expertise. The basing of decisions 'on proper science' has become a mantra for the pro-whaling countries.

Hungary noted that, as a small country with high biodiversity, it has made great efforts to protect its environment. These efforts have been further strengthened by its recent accession to the EU. It reported that over 10% of its territory is protected, with ten national parks - one established over 30 years ago. It has more than 1 000 protected species for which trade is prohibited. Although a land-locked country, Hungary stated, it believes that it can contribute to the preservation of the oceans - a common heritage of mankind.⁶⁰⁰ Hungary, according to its

⁵⁹⁶ *Ibid.* See 16.

⁵⁹⁷ 'Japan Looking to Overturn Whaling Ban' *ABCnews* 21 July 2004; http://abcnews.go.com/wire/World/ap20040717_232.html.

⁵⁹⁸ 'Chair's Report of the 56th Annual Meeting', 19-22 July 2004, Sorrento, Italy 11; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

⁵⁹⁹ IWC 'Opening Statements of the Fifty-Sixth Annual Meeting' ((19-22 July 2004, Sorrento); written Opening Statement by: Mauritania (IWC/56/OS/MAU).

⁶⁰⁰ 'Chair's Report of the 56th Annual Meeting', 19-22 July 2004, Sorrento, Italy 11; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

written Opening Statement, ‘is a party to all relevant nature conservation agreements like CBD (Biodiversity Convention), CITES, Ramsar, Bonn, Bern Conventions and we have actively participated in these as well’.⁶⁰¹

Tuvalu stated that its total land area is 26 sqkm, but its ocean area almost one million sqkm; and that it relies heavily on marine resources, is keenly aware of overfishing and wishes to use and conserve marine resources wisely and prevent overexploitation. Although whales migrate through its waters, there is no reliable inventory of species and numbers. It wishes to establish a long-term whale research programme and would be pleased to receive any technical support from the IWC.⁶⁰² Tuvalu then suggested that it wishes to ‘use and conserve marine resources wisely’, to ‘prevent overexploitation’, and to ‘make certain that marine resources remain abundant for future generations’.⁶⁰³

Côte d’Ivoire noted that it has given full support to Conventions aimed at rational and sustainable exploitation of natural resources, particularly marine resources and adheres fully to the spirit and word of the ICRW. It would support Commission resolutions for a sustainable and responsible use of whale resources based on sound science, and to this end suggested that the RMS should be completed/implemented.⁶⁰⁴ In the same language, in its written Opening Statement, Côte d’Ivoire ‘suggest[ed] that the modern dispositions of management in the RMS be completed and incorporated in the [ICRW]. Also, the IWC should appreciate the opportunities which might be offered by a dynamic and mutual collaboration with the international institutions, among which the FAO, in the implementation of a sustainable management policy of marine resources’.⁶⁰⁵

Reading first Opening Statements can be illuminating; even though they are usually short on commitments, with those commitments that are made in them tending to be vague. Usually, though, there are keywords to be found which give indications as to which bloc the adhering state will align itself with. In Côte d’Ivoire’s case, for instance, the commitment to full adherence to the ‘spirit and word’ of the ICRW, ‘based on sound science’, and the suggestion of collaboration with the FAO (implying that whales should be seen as a food resource) indicate that the country can be expected to vote consistently with the Japanese delegation, at least for the present, as with most African countries.

Belgium noted that its adherence was supported strongly by its parliament and civil society; and that it believed its adherence to be ‘coherent’ with its early expeditions to the Antarctic, and its participation as a founding member of both the Antarctic Treaty and CCAMLR. It noted that it will work actively and constructively with all Commission members towards a high level of governance, transparency and efficiency with a view to taking the right decisions

⁶⁰¹ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ ((19-22 July 2004, Sorrento); written Opening Statement by: Hungary (IWC/56/OS/HUN). On the Ramsar Convention see (n 910); on the others see [Annex D](#).

⁶⁰² ‘Chair’s Report of the 56th Annual Meeting’, 19-22 July 2004, Sorrento, Italy 11; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

⁶⁰³ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ ((19-22 July 2004, Sorrento); written Opening Statement by: Tuvalu (IWC/56/OS/TUV).

⁶⁰⁴ ‘Chair’s Report of the 56th Annual Meeting’, 19-22 July 2004, Sorrento, Italy 11; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

⁶⁰⁵ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ ((19-22 July 2004, Sorrento); written Opening Statement by: Côte d’Ivoire (IWC/56/OS/COT).

for the benefit of present and future generations and in collaboration with other international bodies.⁶⁰⁶

Suriname noted that it supports the principle of sustainable use of all marine living resources, including cetaceans; that it has made significant investments to make its fishing industry viable; and that it has taken measures to comply with all international regulations regarding sustainability and biodiversity. It has, it suggested, followed the debate in IWC for many years, and is surprised that whales, which consume large quantities of fish, are regarded by many as a resource that should remain unutilised at a time when nations are striving to maintain food security. Suriname recognised IWC as the global authority in relation to the management of whales and the regulation of whaling, but expected it to respect the interests of both the resources and the users of those resources and to base decisions on the best scientific advice available.⁶⁰⁷

It was noted that voting rights were suspended for Costa Rica, Côte d'Ivoire, Morocco and Senegal (although Senegal's rights were restored later in the meeting).⁶⁰⁸ These Opening Statements provided interesting examples of the things State reps *say*. Suriname, surprisingly perhaps, nailing its colours to the mast at once; where one might expect countries to come in a little more circumspectly.

Denmark, in its written Opening Statement, suggested that the 'IWC has come to a critical point in its recent history. It is now time for the IWC to return to its responsibility as an organisation for *both* the management *and* the conservation of the great whales'. Denmark argued, therefore, that the RMS,⁶⁰⁹ including 'a robust and cost-effective inspection and control scheme for future commercial whaling', be 'approved and fully implemented' as soon as is possible. It is interesting to note that Denmark chose to split 'management' and 'conservation'; as though the former means use and the latter means preservation. Denmark concluded by suggesting that, recognising that 'the conservation of whale stocks is part and parcel of the RMS', the details of the RMS ought to be finalised over the course of the next year; and then adopted at IWC 58 in Ulsan, Korea.⁶¹⁰ It is interesting also to see Denmark suggesting a dual role for the Commission - Denmark being both a member of the anti-whaling European Union; and at the same time (arguably, through Greenland and the Faroes) a whaling country.⁶¹¹

Japan, in its written Opening Statement, suggested also that the meeting was a critical one. Japan stated that the 'general public as well as parliamentarians in Japan have come to the end of their patience on this matter and demand that the Japanese Government consider all options to resume sustainable whaling if the IWC has not implemented a reasonable Revised Management Scheme (RMS) by the 57th Annual Meeting next year'. Japan then argued strongly that 'Paragraph 10(e) of the Schedule is no longer in force due to its actual wording

⁶⁰⁶ 'Chair's Report of the 56th Annual Meeting', 19-22 July 2004, Sorrento, Italy at 11; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

⁶⁰⁷ *Ibid* at 11.

⁶⁰⁸ *Ibid* at 11.

⁶⁰⁹ See 8.1.

⁶¹⁰ IWC 'Opening Statements of the Fifty-Sixth Annual Meeting' (19-22 July 2004, Sorrento); written Opening Statement by: Denmark (IWC/56/OS/DEN).

⁶¹¹ See 17.1.5 and (n 2291).

(“... and by 1990 at the latest ...”)’ and due to ‘the unnecessarily long delays in implementing the RMS for the resumption of commercial whaling on a sustainable basis’.⁶¹² Norway agreed; arguing in its written Opening Statement that ‘the Moratorium is no longer binding on the Parties to the convention, because of the failure of the Commission to honour the provisions set out in [Section] 10(e) of the Schedule’. ‘Furthermore’, argued Denmark, ‘the Parties to the Convention neither empowered the IWC to declare a moratorium on whaling nor the authority to establish sanctuaries without basing the decision on proper scientific evidence and recommendations’.⁶¹³

Germany, in its written Opening Statement, used much the same language as had Denmark; suggesting that ‘Germany recognises both mandates laid down in the IWC Convention, that is to say the conservation *and* management of whale stocks’. ‘While the Conservation Committee’, argued Germany, ‘should devote itself to whale conservation, it should on no account prevent the management of stocks’.⁶¹⁴

India, in its written Opening Statement, argued that, apart from ‘illegal harvesting’, factors like environmental pollution, climatic changes and bycatch, mean that ‘the challenges faced by whales are much more serious than ever before’; and that, in consequence, ‘there is now a greater need for international cooperation for protecting whales than ever before in the history of the IWC’. India stated that it ‘would like to remind all ... [that] the whale is not one giant meat ball’; and that the ‘right of the whale in its natural environment to roam unhindered and un-threatened in the blue waters that constitute two-third of our world must be recognized without any qualification’.⁶¹⁵ It is interesting to note that India is a country which can probably claim to act consistently in respect of both the elephant and the whale - being opposed to the trade and exploitation of both species.

An interesting indication, perhaps, of where countries stand can be seen in regard to the adoption of the agenda. Japan, as in 2003, objected to a number of items on the agenda as being contrary to the objectives or outside the scope of the Convention; and proposed deletion of items on whale killing methods, and on sanctuaries.⁶¹⁶

A number of countries - Japan and Denmark especially - had gone into the meeting declaring that it would be a ‘crucial’ meeting. With hindsight, it probably was not as significant as it was billed by several countries to be; although in subtle ways - such as in the joinder of four new apparently pro-whaling countries (Côte d’Ivoire, Mauritania, Suriname and Tuvalu) which somewhat narrowed the gap between the polarised voting blocs - it may yet come to be seen as having played an important role.

⁶¹² *Ibid*; written Opening Statement by: Japan (IWC/56/OS/JAP).

⁶¹³ *Ibid*; written Opening Statement by: Norway (IWC/56/OS/NOR).

⁶¹⁴ *Ibid*; written Opening Statement by: Germany (IWC/56/OS/GER).

⁶¹⁵ *Ibid*; written Opening Statement by: India (IWC/56/OS/IND).

⁶¹⁶ ‘Chair’s Report of the 56th Annual Meeting’, 19-22 July 2004, Sorrento, Italy at 13; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006). Benin, Rep of Palau, Rep of Guinea, Norway, Gabon, Iceland, St Kitts and Nevis, St Lucia, Dominica, Nicaragua, Mauritania, and Morocco spoke in support of Japan. The UK, supported by Germany, New Zealand, Italy, India, the US, Mexico, Brazil, Monaco, Peru, Australia, Spain, and Sweden, did not agree.

3.3.16 Issues after IWC 56

In September 2004, the Japan Whaling Association reported in *JWA News* that '[t]he [IWC], bitterly torn apart by pro- and anti-whaling countries, edged toward dialogue for consensus at its 56th annual meeting ... as the number of members advocating sustainable use of whale resources increased to balance the power between the two opposing forces'. In particular, the *JWA News* pointed to the fact that the Japanese Commissioner lost by only one vote to the South African Commissioner in the election of a vice chairman.⁶¹⁷

In October it was reported that, as from 12 October, the Ministry of Agriculture, Forestry and Fisheries in Japan had revised its ministry decrees 'to permit, subject to some conditions, the catch and use of baleen and other whales that were stranded on Japan's shore'.⁶¹⁸ This can perhaps be seen as an 'upping of the ante' by Japan - a 'pushing of the boundaries'.

3.3.17 IWC 57, 2005 - the lead-up

In June it was reported that Japan had opened the meeting by announcing that it planned to begin catching about 850 minke whales annually in the Antarctic Ocean, starting later this same year; this number being more than double the 400 minke whales Japan was then claiming to catch each year for research purposes. At the same time it was reported that members of Japan's ruling Liberal Democratic Party were suggesting 'their government should consider withdrawing from the whaling body unless it makes measurable progress toward allowing commercial hunts'; with Japanese lawmaker Yoshimasa Hayashi stating that 'Japanese people have been frustrated for so many years' and that '[e]very year the frustration is brewing'.⁶¹⁹

In the run-up to the meeting, it was reported in an editorial in *Nature* that:

[t]he main bone of contention at this year's meeting is a proposal by Japan to double the scope of its 'research whaling' programme - its thinly disguised arrangement to continue some whaling despite a moratorium on commercial whaling that the IWC implemented in 1986. The plan may get a sympathetic hearing at Ulsan because pro-whaling nations now seem to have a majority on the IWC for the first time. This has come about because 23 new members - some with a dubious interest in whales, dead or alive - have joined the IWC in the past five years, taking its total membership to 62. Whaling opponents whisper that Japan 'goes shopping', as one of them puts it, for small, poor countries such as Kiribati and Tuvalu in the south Pacific to join the body in exchange for aid. ... buffeted by criticism, as it may be, the IWC continues to implement the international regime that stands in the way of unregulated whaling - and of the probable extinction of several whale species. ... And despite its grouching, Japan wants to be seen as a good international citizen; it is unlikely to pack up its marbles and go home. It will remain at the table, infuriating its opponents at times but basically conforming with an imperfect international process. Conservation biologists should do likewise, cajoling more friendly

⁶¹⁷ 'Increase in Pro-Sustainable Use Members Prompts the IWC to Move toward Dialogue' *JWA News* No 10, September 2004; http://www.whaling.jp/english/news/jwa_news_10.pdf (accessed 7 June 2006). The South African Commissioner being Horst Kleinschmidt.

⁶¹⁸ 'Japan Alleviates Rules on the Use of Stranded Whales' *JWA News* No 11, January 2005; http://www.news.whaling.jp/english/news/jwa_news_11.pdf (accessed 7 June 2006). It was reported that '[u]nder the new decree, the stranded animals would be placed under the control of the regional government provisionally, and the parties concerned in the region, including fisheries co-operative associations, are to decide on the use after consultations among them'. *Ibid.*

⁶¹⁹ 'Anger over bid to hike whale catch' *CNN.com* 20 June 2005; <http://cnn.worldnews.com> (accessed 20 June 2006).

nations to sign on and grimly adhering to the only path that can, in its convoluted way, save the whales.⁶²⁰

This editorial is quoted in full to illustrate what is probably the most common Western attitude toward Japan's efforts to garner support for its cause. It is, however, a surprisingly unsubtle, in fact quite excitable, editorial; and probably not worthy of a journal as respected as is *Nature*.

3.3.18 IWC 57, 2005

The IWC met in May and June in Ulsan, Korea. The plenary meeting opened on 20 June, and was Chaired by Henrik Fisher from Denmark. There were nine new member nations to the IWC, bringing the total to 66. At the start of the meeting, 57 countries with the right to vote were present. The Agenda was adopted despite proposals - once again - by Japan to delete items concerning sanctuaries, whalewatching, whale killing methods, small cetaceans, health issues and the Conservation Committee.

In 2004 the Netherlands had raised discussion of how legal issues arising within the IWC might be addressed. This was discussed again in 2005, but with little agreement resulting.⁶²¹

3.3.19 Assessments after the Meeting

At the end of the meeting, it was reported that the meeting had ended with the usual impasse and that the underlying cause of this situation, according to the whaling commissioner for the Netherlands, Giuseppe Raaphorst, 'is the convention itself'; which was, he said, 'simply too old'. 'It was adequate in 1946, but that's already about 60 years ago', he apparently said; and added that '[n]ow whaling has become very problematic for many countries - actually most countries want it to be stopped - it's important that you have more control mechanisms and sanctions'.⁶²²

The Netherlands and New Zealand, it was reported, are 'part of a developing movement which wants to resolve the impasse by re-examining the convention and the commission charged with administering it. They believe it might be possible at ministerial level to tie whaling to other issues, such as trade or Japan's bid for a permanent seat on the United Nations Security Council. Towards the end of this week-long meeting, the idea of a ministerial meeting was formalised in a resolution proposed by Ireland, Germany and South Africa'. The proposal was for there to be further meetings of the IWC's RMS Working Group; and 'if appropriate, ministerial, diplomatic, or other high-level possibilities to resolve these issues among the Contracting Governments to the Convention'. The resolution was adopted by a substantial majority; but Japan expressed concern that it would not be a good idea for the contention

⁶²⁰ 'Much whaling and gnashing of teeth' - Editorial (16 June 2005) 435 *Nature* 856 at 856.

⁶²¹ Chair's Summary Report for the 57th Annual Meeting Korea, June 2005 7 http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC57.pdf (accessed 25 May 2006). The Netherlands suggested that the focus of for a process for providing legal advice should be on legal matters that might arise from institutional issues such as adherence, the Convention and the Schedule. The Netherlands suggested an *ad hoc* open-ended working group comprising legal experts from Contracting Governments, which group could then call for further external advice. It was agreed that the Netherlands would consult and report back next year. *Ibid*.

⁶²² R Black 'Reform likely on whaling process' *BBC News* 24 June 2005; <http://news.bbc.co.uk/go/pr/fr/-/1/hi/sci/tech/4618763.stm> (accessed 12 June 2006).

within the IWC to spread to other negotiating areas'.⁶²³ What the positive spin of a possible move toward resolution does not convey is that any such resolution would require years of planning and intricate and subtle negotiation. How likely reform truly is, remains hard to ascertain. Any small steps toward eventual agreement, however, would probably be welcomed by the impartial observer.

In June it was reported in the general media that '[p]ro-whaling countries failed to muster a majority on Monday at the annual whaling commission meeting, in a setback for their hopes to control its agenda and eventually overturn a nearly two-decade ban on commercial whale hunts'.⁶²⁴ *JWA News* reported, however, that '[the] meeting was characterized by the fact that the votes of pro-use countries and anti-whaling countries almost equaled as a result of the increase in membership in the pro-use bloc. The total number of IWC members increased from 57 last year to 66'.⁶²⁵ 'Despite the [] results', commented *JWA News*, 'Japan and other pro-use countries generally strengthened their confidence as the difference in votes narrowed visibly. IWC watchers observe that the moves of additional new members and existing middle-of-the-road members will hold the key to the direction of future IWC meeting'.⁶²⁶

3.3.20 IWC 58, 2006: the lead-up

Early in 2006 it was reported that '[i]n the biggest whale slaughter for a generation, more than 2000 animals are likely to be directly hunted by the three countries continuing whaling in defiance of world opinion: Japan, Norway and Iceland. And in a crucial political move, this year the pro-whaling nations look likely to achieve their first majority of votes in [the IWC]'.⁶²⁷ 2006 appeared in fact to see an escalation both of whaling efforts, and of protests against these.⁶²⁸

It was also reported early in 2006 that '[t]he Japan Whaling Association (JWA), which promotes and protects Japan's whaling culture and works in the interests of whaling peoples, [had] said [that] it was an encouraging sign that only 17 nations had supported a Brazil-led demarche against science and sustainable whaling'. In a press statement released on January 19, 2006, JWA President Keiichi Nakajima said that only 17 of the IWC's current 66 members

⁶²³ *Ibid.*

⁶²⁴ 'Setback for pro-whaling nations' *news24.com* 20 June 2005 http://www.news24.com/News24/Technology/News/0,,2-13-1443_1723862,00.html (accessed 20 June 2006).

⁶²⁵ 'Pro-use Votes Close to Simple Majority at the 57th IWC Meeting in Korea' *JWA News* No 12, September 2005; http://www.whaling.jp/english/news/jwa_news_12.pdf (accessed 7 June 2006).

⁶²⁶ *Ibid.*

⁶²⁷ M McCarthy 'Whales under threat again' *The New Zealand Herald* 3 January 2006

http://www.nzherald.co.nz/location/print.cfm?l_id=5&objectid=10362282 (accessed 26 May 2006). It was reported in the media that '[s]ome campaigners are now calling for the anti-whaling countries - the so-called "like-minded" group, led by New Zealand, Australia, the US and Britain - to take legal action against Japan over the "scientific" whaling issue.

"Scientific whaling needs to be stopped, and legal action needs to be taken against Japan in the International Court," said Joth Singh, director of wildlife and habitats for the International Fund for Animal Welfare'. M McCarthy 'Whales under threat again' *The New Zealand Herald* 3 January 2006

http://www.nzherald.co.nz/location/print.cfm?l_id=5&objectid=10362282 (accessed 26 May 2006). The trouble, of course, is that this report is simply too vague - possibly the International Court of Justice (or ICJ) is the 'International Court' referred to; but how Japan's cooperation would be obtained is not dealt with. As another possibility, Australia appears occasionally (especially in the lead-up to the 2006 IWC Meeting) to have mouthed threats to take the matter to the Law of the Sea Tribunal. Also, see *Annex A.1*, esp. Article IX:3; and (n 418), (n 2466) and (n 2512).

⁶²⁸ 'JWA Condemns Ill-intentioned Harassment by Greenpeace and Sea Shepherd in the Antarctic' *JWA News* No. 13, March 2006; http://www.whaling.jp/english/news/jwa_news_13.pdf (accessed 7 June 2006).

had supported the protest; and that, ‘quite noticeably’, the United States, Switzerland and Denmark were not among the 17. ‘The world’, said Nakajima, ‘wants a resolution to the current impasse at the IWC, not more politics. The world wants the IWC to meet its legally binding obligation of producing and implementing a sustainable commercial whaling regime where the rules are obeyed and seen to be obeyed’.⁶²⁹

3.3.21 Mounting alarm in the anti-whaling camp

In April, it was reported that ‘[i]n a remarkable diplomatic coup, Japan, the leading pro-whaling nation, is poised to seize control of whaling’s regulatory body’. The averment was then made that ‘while the world has been looking the other way’, the Japanese have ‘spent nearly a decade and many millions of dollars building up a voting majority in the IWC, by buying the votes of small member states with substantial foreign aid packages’. Concern was then expressed that Japan, with numerical control, would be able to take significant steps toward having the moratorium lifted; such steps including the introduction of secret ballots.⁶³⁰ The problem with this argument, of course, is that - if followed to its logical conclusion - it would imply that Japan is correct to argue that a significant number of countries really *do* wish to vote other than as they do - and to support a resumption of commercial whaling.

Also in April, it was reported, after the meeting of the Revised Management Scheme (RMS) Working Group in Cambridge on 28 February, that the IWC had issued a press release announcing that IWC member nations had become deadlocked. It was, however, suggested that ‘[w]ord is circulating that the US government offered to work with Japan bilaterally on the issue of controlling Japan’s continued scientific whaling hunts in the Southern Hemisphere and off the coast of Japan’.⁶³¹ Little more of this seems to have come into the open; but it is certainly not an untenable suggestion. The US, after all, would by now have had its attention firmly on implications for its own whaling at IWC 59, 2007, to come.

According to a May 2006 South African media report, ‘Horst Kleinschmidt, former deputy chairman of the [IWC], has joined the radical Sea Shepherd Conservation Society ... Kleinschmidt, a former deputy director-general at the Department of Environmental Affairs, acknowledged this week that his move was likely to be controversial, because of the society’s militant stance’.⁶³² According to the Sea Shepherd Conservation Society itself, ‘Kleinschmidt has joined the Sea Shepherd Conservation Society Advisory Board and also is now a sitting director of Sea Shepherd South Africa’.⁶³³ Kleinschmidt himself wrote in June 2006 that

⁶²⁹ By way of example, in March it was reported that Japan had, in December 2005, launched a second phase of its scientific whaling programme JARPA - JARPA II - ‘with the aim to survey the actual situation of competition among whale species’. ‘Fewer Nations Anti-whaling’ *JWA News* No. 13, March 2006;

http://www.whaling.jp.english/news/jwa_news_13.pdf (accessed 7 June 2006). See 8.2.

⁶³⁰ ‘The great betrayal: Japanese seize control of whaling commission’ *Ocean Conserve - Ocean Conservation Portal* 17 April 2006; <http://www.oceanconserve.info/articles/print.asp?linkid=55254> (accessed 29 May 2006).

⁶³¹ H Rockwell ‘A Whaling Prelude to St Kitts’ *Cetacean Society International Whales Alive!* Vol. XV No. 2 April 2006; <http://csiwhalesalive.org/csi06201.html> (accessed 29 May 2006). See also: M Ryan ‘Blades honed and blubber in sight’ *Sunday Tribune* 21 May 2006 at 20.

⁶³² M Gosling ‘Of reformists and radicals’ *Sunday Tribune* 21 May 2006 at 20.

⁶³³ ‘Former Vice-Chair of the International Whaling Commission Joins Sea Shepherd Board’ *Sea Shepherd News* 10 May 2006; http://www.seashepherd.org/news/media_060510_2.html (accessed 25 May 2006). Interestingly, Australia’s Environment Minister, Ian Campbell, followed suit in late 2007 and joined Sea Shepherd’s Board after losing his Cabinet seat in Australia’s government. ‘Ian Campbell Joins the Sea Shepherd Advisory Board’ *Sea Shepherd News* 10 January 2008 http://www.seashepherd.org/news/media_080110_1.html (accessed 14 January 2008).

'[o]nce more the tussle between pro-whalers and anti-whalers is poised on a knife-edge. Once again the vote depends on who recruited more nations to join in this annual ritual'. He then described the opposing sides as being 'so far apart that middle ground is elusive'; and the debate on the IWC floor as being 'surreal'.⁶³⁴ When the present writer asked him about his joining, Kleinschmidt explained that the Advisory Board had largely a ceremonial function; but that he had been willing to put his name to it because he felt Sea Shepherd to be the 'only show in town that is actively and exclusively anti-whaling'.⁶³⁵ Kleinschmidt comes across as a person unafraid to be controversial.

The IWC Meeting was set to run from mid-May to mid-June 2006, in St Kitts and Nevis. The attitude of the host country was evident from a report in April, where the Senior Fisheries Officer in the St Kitts-Nevis ministry of Agriculture was quoted as saying that 'the stance of some countries and agencies with regard to the issue of whaling is based on emotion and not science'.⁶³⁶

St Kitts and Nevis has had a somewhat rocky ride on the IWC. According to a summary by Greenpeace, the country joined the IWC in 1992; five days before the IWC met in Glasgow. The country's Commissioner 'was absent whenever votes were taken', so St Kitts cast no votes. After the 1992 meeting, St Kitts and Nevis continued paying its fees (of around £14 000 a year) but not attending meetings. By 1995, however, it had fallen behind in its payments and had lost the right to vote, eventually owing the IWC about £50 000. In 1998 St Kitts attended only its second IWC meeting (held in Muscat, Oman) but, because of its debt, was not allowed to vote. However it did co-sponsor a Japanese-driven draft resolution. By the time of the 1999 IWC meeting St Kitts had paid its debts and has had full voting rights ever since. In conclusion, Greenpeace records that 'since 1999, St Kitts has cast 88 votes; 82 have been identical to Japan's and on the votes Japan refused to participate in St Kitts also refused. On a few occasions St Kitts has voted when Japan abstained and vice versa. St Kitts has never cast a vote against Japan'.⁶³⁷

In May, on the eve of the Meeting, it was reported that [p]ro-whaling countries, led by Japan, were 'confident' that they had enough votes to win control of the '66-nation [IWC] for the first time at its annual meeting'.⁶³⁸ The same report suggested that 'pro-conservation countries', led by the so-called 'like-minded group' (Australia, New Zealand, the US and Britain),⁶³⁹ had now launched a counter diplomatic effort. The gist of the report, though, was that this might have been left until too late; but that New Zealand's Minister for the Environment, Chris Carter, was visiting the South Pacific 'to lobby against whaling'. Carter was described as having praised Kiribati (formerly the Gilbert Islands) for 'creating the third

⁶³⁴ H Kleinschmidt 'Things you won't hear at the whaling commission' *Mail & Guardian* 9 June 2006 24.

⁶³⁵ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

⁶³⁶ 'Science, not emotion, must influence whaling issue' *caribbeannetnews.com* 28 April 2006; <http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000014/001414-p.htm> (accessed 25 May 2006).

⁶³⁷ 'Greenpeace ship banned from St Kitts on eve of whale meeting' *Greenpeace* 13 June 2006; <http://www.greenpeace.org/international/press/releases/greenpeace-ship-banned-from-st#> (accessed 19 June 2006). See also: T Best 'Whaling Controversy: Secret Ballot a Long-Desired Goal of Caribbean Nations' *Hardbeatnews.com* 12 May 2006; http://www.hardbeatnews.com/editor/RTE/my_documents/my_files/details.asp?newsid=6 (accessed 29 May 2006).

⁶³⁸ I Mather 'Whaling ban on edge of extinction' *Scotland on Sunday* 21 May 2006;

<http://scotlandonsunday.scotsman.com/index.cfm?id=754182006&format=print> (accessed 25 May 2006).

⁶³⁹ Membership of the 'Like-minded Group' is somewhat fluid - a number of other countries are also occasionally cited. See 3.3.26.

largest marine protected area in the world, and said New Zealand would offer a training and survey programme'. However, Carter apparently 'failed to persuade the archipelago of Tuvalu to vote with the conservation camp, despite the fact that both New Zealand and Australia give it regular aid'. The report quoted a Tuvaluan government official as saying that 'Tuvalu should be allowed, as a sovereign nation, to make its independent decision on what is best for its people. We are for the sustainable use of whatever resources we have - be it whales, fish, forestry or land'.⁶⁴⁰

In May 2006 it was reported in *National Geographic* that Paul Watson of Sea Shepherd argues that there is 'no debate'; as the Japanese whalers are 'acting commercially under the auspices of 'bogus research' and therefore are in violation of the 1986 moratorium' and that the whalers 'are also in clear conflict with the Convention on International Trade in Endangered Species (CITES)'.⁶⁴¹ Obviously, there are at least two things wrong with this view. That the research conducted by Japan is not genuine is an interesting argument; but at this stage remains only a contention. It is clear-cut that genuine research would be protected (and that there would then be an obligation to utilize the whale meat); it is also implied that 'bogus' research would not be protected under the ICRW. Between these two extremes, however, the water is murky - how is one to determine whether the research is genuine or not? Ultimately, the only way to determine this would be to have the IWC rule - but the IWC's ruling would depend on a political majority which might not be genuinely voting as it believed. As to the point about CITES, this is clearly incorrect: the whale meat has not been traded across international borders.

At the end of May, it was reported that 'Australia began a last-ditch attempt to lobby small Pacific Island nations to support whale conservation on Tuesday, warning that every vote at next month's [IWC] meeting would be crucial'.⁶⁴² Something of the frenzy which began to grip the Western media can be seen from a report from the normally sober UK newspaper *The Guardian*, also in late May, in which it was reported that '[a]bout 35 pro-whaling countries, ... are expected to gain control of the 66-member [IWC]'; and that 'in a triumph of intensive lobbying led by Japan, they are likely to dismantle the laws that protect whales and prepare for the eventual full resumption of commercial whaling' - and that 'to the horror of more than 150 large conservation organisations worldwide, the anti-whaling countries led by Britain, New Zealand, Australia and the US, say there is little that can now be done diplomatically to prevent the takeover by pro-whalers at the IWC meeting'.⁶⁴³

⁶⁴⁰ *Ibid.* And see M Bennis 'Ad hopes to harpoon pro-whaling vote' *Sydney Morning Herald* 28 May 2006; <http://www.smh.com.au/news/national/ad-hopes-to-harpoon-prowhaling-vote/2006/05/27/1148524933520.html#> (accessed 29 May 2006); and 'Sea Shepherd Urges New Zealand to Withdraw Aid from Pro-Whaling Nations' *Sea Shepherd News* 11 May 2006 http://www.seashepherd.org/news/media_060511_1p.html (accessed 7 June 2006); and 'Japan to Murder 260 Whales in the North Pacific this Summer' *Sea Shepherd News* 25 May 2006 http://www.seashepherd.org/news/media_060525_1.html (accessed 7 June 2006).

⁶⁴¹ P Heller 'The Whale Warriors' *National Geographic* May 2006; available on www.seashepherd.org (accessed 26 July 2006).

⁶⁴² 'Australia lobbies Pacific nations against whaling' *Reuters* 30 May 2006 <http://today.reuters.com/misc/PrinterFriendlyPopup.aspx?type=scienceNews&storyID=2.html> (accessed 1 June 2006).

⁶⁴³ J Vidal & J McCurry 'Japan sets course for return to commercial whaling' *The Guardian* 30 May 2006 <http://www.guardian.co.uk/fish/story/0,,1785651,00.html> (accessed 6 June 2006). It was reported that '... Japan is [] known to have increased aid to countries such as Belize, Mali, Togo, Gambia and others which have joined the IWC recently but who have not so far voted. Earlier this year it pledged more than \$1 m (£538,000) to the Pacific island of Tuvalu, a pro-whaling IWC member, and has reached similar deals with Nauru and Kiribati and other desperately poor countries in the Pacific. *Ibid.*

In June it was reported that ‘Japan and Norway are on the cusp of gaining control of the [IWC]’ and that ‘in recent years Japan has recruited at least 19 countries - many from West Africa and the Caribbean - to join the commission and support expanded whaling’.⁶⁴⁴ It was also reported that ‘Japan is confident that the pro-whaling camp will have a majority now that the Marshall Islands and Cambodia have joined the [IWC]’. According to the report, their admissions ‘have brought the number of IWC countries to 69, Japan’s most optimistic projections put the number of countries supporting its bid to 36, with 32 against and the stance of one unknown’.⁶⁴⁵

In the general frenzy that was raging through the world’s media in June, it was reported that ‘[t]he anti-whaling bloc is now led informally by Australia, New Zealand and Britain, with the US a major ally. Within the last year this group has co-ordinated letters of diplomatic protest to Norway and Japan, signed by 12 and 17 countries respectively’.⁶⁴⁶ Also in June, it was reported that ‘New Zealand will be fighting a rearguard action to stop Japan seizing control of the [IWC] ... this week’.⁶⁴⁷ In mid-June, it was reported that ‘[w]hile the ban on commercial whaling is not itself in immediate peril ... anti-whaling campaigners [are] fearing the worst’;⁶⁴⁸ and, in Australia, that ‘Federal Environment Minister Ian Campbell says he is not confident moves to stop Japan continuing its whaling program will be successful’.⁶⁴⁹ With tensions clearly running high, in June, St Kitts and Nevis barred a Greenpeace vessel from entering its harbour.⁶⁵⁰

Again in June, it was reported that ‘[a]n international whaling group is expected to try to chip away at a moratorium on commercial whaling that environmentalists say has saved the Earth’s largest creatures from extinction’;⁶⁵¹ and that Japan ‘intends to propose at the IWC the establishment of a new group of nations that support commercial whaling, and use it to reform the fractious organization’. The same report quoted Hideki Moronuki, head of the whaling section at Japan’s Fisheries Agency, as saying recently that ‘if things go on like this, the *raison d’être* of the IWC as a whaling management organization disappears’; and, importantly for the linkages being drawn between the IWC and CITES in the present thesis, Norway’s IWC Commissioner, Karsten Klepsovik, as saying that ‘a simple majority at the IWC would be

⁶⁴⁴ J Eilperin ‘Whaling Agency Faces a Possible Shift’ *Washington Post* 2 June 2006 <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/01/AR20060601/01684.html> (accessed 2 June 2006). According to the *Washington Post* report, Caribbean media reported in November 2001 that Japan gave \$17 million in Antigua in exchange for support on whaling. But [Joji] Morishita denied any link, noting that countries such as India, Brazil and Peru receive aid from his country but oppose whale hunts. “If we were to try to connect the policy and the aid, they should be on our side, but they are not,” he said, noting that the United States has brought its own allies, such as Israel, into the IWC. “It is simply not connected”. *Ibid.*

⁶⁴⁵ ‘Two ‘pro-whaling’ countries join IWC’ *The Age* 5 June 2006 <http://www.theage.com.au/news/World/Two-prowhaling-countries-join-IWC/2006/06/05/1149359651697.html#> (accessed 6 June 2006).

⁶⁴⁶ R Black ‘Whaling nations set for majority’ *BBC News* 11 June 2006 <http://news.bbc.co.uk/go/pr/fr/-/2/hi/science/nature/5066538.stm> (accessed 12 June 2006).

⁶⁴⁷ G Fleming ‘NZ still hoping to turn whaling tide’ *NZPA* 13 June 2006 <http://www.stuff.co.nz/stuff/print/0,1478,3699379a10,00.html> (accessed 13 June 2006).

⁶⁴⁸ S Collinson ‘Japan tipped to wrest control of whaling commission at St Kitts meeting’ *caribbeannetnews.com* 13 June 2006 <http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000019/001964-p.htm> (accessed 16 June 2006).

⁶⁴⁹ ‘Campbell talks down whaling vote prospects’ *ABC News Online* 14 June 2006 <http://www.adb.net.au/news/newsitems/200606/s1662937.htm> (accessed 14 June 2006).

⁶⁵⁰ M Christie ‘Greenpeace ship barred from St Kitts’ *caribbeannetnews.com* <http://www.caribbeannetnews.com/cgi-script/csArticles/articles/000019/001988-p.htm> (accessed 16 June 2006).

⁶⁵¹ M Christie ‘Whaling ban faces stiff test at Caribbean meeting’ 12 June 2006 *Reuters* <http://today.reuters.com/misc/PrinterFriendlyPopup.aspx?type=scienceNews&storyID=2> (accessed 15 June 2006).

enough to request the UN's Convention on International Trade in Endangered Species to lift a ban on trade in minke whales'.⁶⁵²

This is of course a significant comment - being a direct suggestion from an important IWC Commissioner that CITES might be used to circumvent the IWC. Even further, the suggestion is that CITES might be used to make the IWC irrelevant. As a possible consequence of the obtaining of a numerical majority, this shows how important the linkage is - a year later, at IWC 59, Karsten Klepsvik confirmed to the present writer that Norway does see important similarities and linkage between the two treaties.⁶⁵³

It was also reported in June that '[p]ro-conservation nations such as Australia, New Zealand, Brazil, the United States and the United Kingdom' had been trying to garner support for their views. Australian Environment Minister Ian Campbell was alleged to have 'spent months lobbying the Pacific island members of the commission' - although 'with uncertain results'. The accession to the IWC in 2005 and 2006 of countries such as Cameroon, the Gambia, Nauru, Togo, Cambodia, Guatemala, the Marshall Islands and Israel, indicates that the pro-whaling nations may have secured the majority of votes after losing votes for years to the conservation bloc'. This is clumsily put, of course, as Israel would clearly not be expected to vote against the Like-minded Group. Japan, said the report, 'now counts 36 supporters among the 70 member nations of the commission'; but also that the 'pro-whaling majority is not assured'. In the latter regard, the report contended that 'Japan is the third largest donor to the Marshall islands and has lobbied hard to bring the small country to its side'; but quoted the Director of the Marshall Islands Marine Resources Authority, Glen Joseph, as saying that the Marshalls would make its own decision in St Kitts - his words to Radio New Zealand being that '[w]e are going to make the decision on our own grounds and our own judgment of how the issues are presented at the commission'.⁶⁵⁴ Such statements, however, did little to allay the fears of the anti-whaling group - it could hardly have been expected that a person in his position, addressing such an audience, would have said anything other than this.

The anti-whaling countries do have a difficult task convincing the impartial observer that they are not guilty of hypocrisy. While the charge is made - by anti-whaling States and by anti-whaling NGOs - that the pro-whaling states have 'bribed' smaller countries; bringing in small countries to support your position is not a practice only of the pro-whaling states. It was, for instance, reported in June that '[c]onservation advocates are hoping that the smaller countries will not be swayed by cash diplomacy. Israel bolstered the ranks of the pro-conservation nations by joining the commission just days ago'.⁶⁵⁵ The sceptical observer might ask whether Israel joined because it wanted to, in the belief that it had a meaningful role to play, or because its political interests are best served simply by supporting the United States with its vote - and that this is the only 'contribution' which it will make. In regard to Israel's joining, it was reported in June that 'Israel's new government had yet to formulate an official policy on the issue', but that Israel had joined 'in response to a direct plea from the United States to help

⁶⁵² *Ibid.*

⁶⁵³ *Personal communication*: Karsten Klepsvik to E Couzens, Anchorage, 30 May 2007. Klepsvik is Norway's Commissioner to the IWC. [Note: this was not a formal interview.]

⁶⁵⁴ 'Whale Survival at Stake in War Over Commercial Whaling' *Environment News Service* 12 June 2006 <http://www.ens-newswire.com/ens/jun2006/2006-06-12-01.asp> (accessed 15 June 2006).

⁶⁵⁵ *Ibid.*

defend the moratorium on commercial whaling'. This, in the present writer's view, perhaps makes Israel the single country that has joined the IWC without claiming to be doing it for its own reasons. According to the same report, Stewart Tuttle, the US Embassy spokesman in Tel Aviv, had said the US ambassador had 'made a personal appeal to Foreign Minister Tzipi Livni. A formal request also came from the US representative to the whaling commission to the Israeli environment minister'; and that 'the US believes that countries such as Israel can help make a difference in ensuring the long-term conservation of whale species and opposing attempts to weaken or minimize regulations for future whaling operations'.⁶⁵⁶

It was also reported in June that a panel of legal experts (independent, but commissioned by an NGO - the International Fund for Animal Welfare (IFAW)) had 'determined' scientific whaling to be illegal. According to a media report, '[a]n international panel of independent legal experts convened in Paris' released a report on 1st June, which concluded that Japanese scientific whaling is 'unlawful' under international law, and that it 'contravenes key international conventions'.⁶⁵⁷ Certainly, the panel contained some highly respected names;⁶⁵⁸ but one can well imagine the derision with which the Norwegians, Icelanders and Japanese would have greeted its findings.

While many anti-whaling countries and organisations expressed concern, in the lead-up to the IWC Meeting, that pro-whaling countries might achieve a majority; pro-whaling countries and organisations expressed less optimism. A more sober and realistic analysis came from the High North Alliance; which reported in mid-June that as 'the number of member nations to the IWC continues to increase, some join the pro-sustainable camp, [and] others join the anti-camp'. The HNA argued that '[f]or the first time since the 1970s, the conservationists now outnumber the protectionists'; (the term 'conservation' being used in the sense in which it is understood for this thesis) and that 'the whalers have more friends than enemies ... [b]ut that's only on paper'. 'For many reasons', the HNA concluded that it believed that 'the pro-whaling camp will be unable to sustain a simple majority at the IWC'; its argument being that 'the other side ... must have some cards up their sleeves. After all, this is an anticipated situation. It is something they have been crying wolf about for many years'.⁶⁵⁹

The High North Alliance did, however, express optimism in a different sense; arguing that 'the end result of all this is, we believe, a greater willingness to find workable compromises for the future' on the basis that 'those that have been ruling will realise that compromise is the only way they can have influence, and the have been ruled will be happy to note that their

⁶⁵⁶ *Ibid.*

⁶⁵⁷ *Ibid.* See also a Report titled 'The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising Under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)' Panel Members: K Cook, P H Sand, P Sands, A Székely IFAW, 1 November 2007, <http://www.ifaw.org/ifaw/dimages/custom/London%20Panel%20PDF%20Nov07.pdf>. See [8.2](#).

⁶⁵⁸ The members of the International Panel of Independent Legal Experts, who compiled the *Paris Report on Illegal Whaling* were: 'Prof Laurence Boisson de Chazournes (head of Dept of Public International Law and International Organisations, Faculty of Law, Uni of Geneva); Prof Pierre-Marie Dupuy (Uni of Paris II and European University Institute, Florence); Prof Phillipe Sands QC (director Centre of International Courts and Tribunals, Uni College London, barrister Matrix Chambers); Prof Alberto Székely (ad hoc judge International Tribunal on the Law of the Sea, member of the Permanent Court of International Arbitration at the Hague); William H. Taft IV (counsel Fried, Frank, Harris, Shriver and Jacobson, formerly legal adviser for US Dept of State and US ambassador to NATO); Kate Cook (barrister Matrix Chambers, formerly legal adviser to the UK Dept of the Environment)'. *Ibid.*

⁶⁵⁹ 'IWC Survival Kit and Hot Issues' *High North Alliance Web* 12 June 2006 <http://www.highnorth.no/news/pfriend.asp?which=363> (accessed 16 June 2006).

adversaries will give them something, no matter how tiny it is. Positioning has finished. In such an atmosphere, negotiations will calm down; a solution will be found'.⁶⁶⁰

One country that did appear to be trying to play a mediating role was Switzerland.⁶⁶¹ According to a media report, 'Switzerland's position on whaling, which is based on decisions taken purely on a scientific basis, remains similar to that of previous years'; being that 'Switzerland would only support limited commercial whaling in restricted geographical areas if it can be proved scientifically that capturing whales in their natural environment does not harm their long-term survival or their ecosystem'. The Swiss delegation, suggested the report, would endorse the creation of new whale sanctuaries, if these were backed by countries neighbouring them and were based on scientific arguments.⁶⁶²

The Japanese themselves also played down the possibility of their gaining a numerical majority. In an interview in mid-June, Joji Morishita, from the Japanese delegation, said that he could not officially confirm numbers. In his words, '[t]here have been some additional members coming to this organisation, but like last year, some members might not show up and many of the sustainable use countries are from poor, developing countries. They may not be able to pay a contribution, then they don't have a voting right. So until the first day comes out, we don't know exactly what the voting balance is'.⁶⁶³

In January the Sea Shepherd Conservation Society had alleged that the South African authorities were aiding the Japanese; after the organisation's ship, the *Farley Mowat*, was detained in Cape Town. It appears that the South African Maritime Authority (SAMA) detained the ship because it did not have a maritime safety certificate - Watson's counter argument was that the ship was registered in Canada as a yacht, and therefore did not legally require a safety certificate.⁶⁶⁴ It is a strange accusation to make, that South Africa is 'in cahoots' with Japan on this one - given that South Africa's stance on whaling appears firmly anti-whaling. Unfortunately, Sea Shepherd gave no details on its website to support the charge, nor even referred to the existence of documentary proof. Of course, it is possible that South Africa could choose to cooperate with Japan when it has nothing to lose by doing so.⁶⁶⁵

⁶⁶⁰ *Ibid.*

⁶⁶¹ 'Swiss prepare for "stormy" whaling meeting' *swissinfo* 16 June 2006
<http://www.swissinfo.org/eng/swissinfo.html?siteSect=43&sid=6813532> (accessed 16 June 2006).

⁶⁶² *Ibid.*

⁶⁶³ S Clarke 'The World Today - Pro-whaling lobby may have majority at IWC' *ABC Online* 16 June 2006
<http://www.abc.net.au/worldtoday/content/2006/s1664679.htm> (accessed 16 June 2006). See also M Christie 'Japan unsure of pro-whaling majority at meeting' *Reuters* 16 June 2006
<http://www.alertnet.org/printable.htm?URL=/thenews/newsdesk/N15391921.htm> (accessed 16 June 2006).

⁶⁶⁴ 'Fear and Loathing in Cape Town - From Fighting Whalers in Antarctica to Fighting Bureaucrats in South Africa' *Sea Shepherd News* 26 January 2006 http://www.seashepherd.org/editorials/editorial_060126_1.html (accessed 17 February 2006). In mid-June it was reported that 'the Sea Shepherd ship *Farley Mowat* slipped out of Cape Town under cover of darkness. ... "We may have burned our bridges with South Africa," said [*Farley Mowat*] Captain Alex Cornelissen, "but this country has disappointed us by siding with the whalers over the whales. We could not allow them to detain us as the Japanese prepare their harpoons for another season of relentless cruel slaughter. We can't waste any further time dealing with bought and paid for bureaucrats - we have whales to save"...'. 'Sea Shepherd Ship Escapes from South Africa' *Sea Shepherd News* 16 June 2006 http://www.seashepherd.org/news/media_060616_1.html (accessed 17 June 2006).

⁶⁶⁵ Some support for the Sea Shepherd contention did come from an unlikely source - *Getaway* magazine in South Africa, which wrote as follows in July 2006:

Japan ended its Antarctic summer whale kill in March, slaughtering an estimated 900 minke whales and 10 fin whales in the name of scientific research. A recent Australian study has shown there is no scientific justification for this. Ian Campbell, Australian Minister for Environment and Heritage, said a 10-year programme in Australia's Antarctic Territory has

The present writer did get the chance to question Paul Watson of Sea Shepherd on this in Anchorage in May 2007. Watson's answer was that he had no 'actual' proof, but that he did have strong suspicion based particularly on the fact that the South African authorities had had an arrest warrant already prepared before the Sea Shepherd ship arrived in Cape Town. This, he concluded, meant that somebody must have given the South African authorities essential details in advance.⁶⁶⁶ When it was put to Watson that he had suggested, at least several times, that the governments of Japan and South Africa had colluded to prevent the Sea Shepherd ship from leaving Cape Town, and he was asked whether he had any evidence of such collusion, his reply was that it is 'hard to really get hard evidence, but when we arrived in Cape Town they had already issued the detainment order - the day before we had arrived - and then they came on board and said they wouldn't recognise us as a yacht'. Watson's take on the matter was that although SAMA claimed that their actions were 'routine'; he, Watson, had been 'doing this for a long time', and 'recognised harassment when he saw it'.⁶⁶⁷

Herman Oosthuizen told the present writer that he had himself asked SAMSA the same question; and had been told that it (collusion) was not the case at all, but that it had been purely a safety resolution.⁶⁶⁸ Horst Kleinschmidt felt much the same way; saying that he felt that if there had been any pressure behind the scenes it would have come from Canada - and that allegations of direct collusion between South Africa and Japan were far-fetched. He felt that the South African officials had 'boxed themselves into a corner' - based on Canada having advised them that Canadian legislation had changed and the definition of a 'sailing vessel' having changed.⁶⁶⁹ Bart Smithers gave me a similar version, that what had really happened was that the Canadian legislation had changed.⁶⁷⁰ Butterworth felt that the most that could have happened was that Japan might have 'brought certain things to diplomatic attention'; but that ultimately the country was simply 'not that unsubtle'.⁶⁷¹

demonstrated that so-called scientific programmes by Japan, Norway and Iceland "are a sham." The Aussie study used non-lethal methods to collect all the data Japan claims it does from the annual cull. The Australian researchers linked whale distribution to ecological factors such as water depth, bottom features and presence of krill - without killing one whale. How sad that the South Africa authorities, signatories to anti-whaling treaties, were bullied through Japanese diplomatic channels to impound Greenpeace's anti-whaling ship *Farley Mowat*, just when the Japanese whaling fleet was heading into the Antarctic. 'Whaling for science unjustified, say Aussies' *Getaway* July 2006 23. Although this small piece is clearly riddled with errors, the present writer thought it might be worth following up to find out what their source was about the 'bullying'; hence the following letter: To: getaway@rsp.co.za, 20 July 2006:

Dear *Getaway*, The brief piece ('Whaling for science unjustified, say Aussies') under "Bush Telegraph" on p23 of your July 2006 issue refers. The piece contains several errors: there are no treaties that are 'anti-whaling'; the ship *Farley Mowat* belongs to the Sea Shepherd Conservation Society, not to Greenpeace; and the ship had returned from confronting Japanese whaling ships in the Antarctic, it was not impounded 'just when the fleet was heading into the Antarctic' - the fleet will resume whaling only toward the end of 2006. However, I am more interested in the assertion that the South African authorities were 'bullied through Japanese diplomatic channels to impound [the ship]'. Sea Shepherd has made the same claim on its website, but without substantiating it. As I am currently researching toward a Ph.D. which touches on this issue, I would be very interested to know your source - and, indeed, any further details which you might have concerning communications between the South African and Japanese governments/authorities on the matter. South Africa's current stance is firmly aligned with anti-whaling nations and one would not expect that the country would support Japan on this issue; however, international law and politics are 'tangled webs' and countries do not always act as one might expect them to. Again, I would appreciate indication of your source, and any further details you might be able to give me - or perhaps you could refer my query to the person who wrote the piece? Regards, Ed Couzens, Senior Lecturer, Faculty of Law, University of KwaZulu-Natal, Durban.

Unfortunately, I did not receive a proper reply - only an undertaking, which was not met, to revert to me.

⁶⁶⁶ *Personal communication* Interview with Paul Watson, Anchorage, 28 May 2007; E Couzens.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

⁶⁶⁹ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

⁶⁷⁰ *Personal Communication* from Bart Smithers, Cape Town, 4 November 2007; E Couzens. Smithers is an independent environmental documentary film-maker who has worked with Sea Shepherd and other conservation organisations.

⁶⁷¹ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

The present writer has spent so much time on the point because proof of collusion between South Africa and Japan in a whaling context would be of potentially huge significance for this thesis. Ultimately, however, it does seem unlikely to me that there *was* such collusion - for the very simple reason that there would have been little point in it. Sea Shepherd had concluded its campaign against the Japanese scientific whaling effort for 2005/6, and was on its way *from*, not *to*, Antarctica when the *Farley Mowat* docked in Cape Town. As such, deliberate harassment would have been done purely for spite; and this seems unlikely.

By mid-June, information was being released from all sides as the frenzy mounted. Japan released data, 'allegedly showing a rise in the numbers of humpbacks and [] fin whales'; and argued that this meant that anti-whaling countries were wrong to worry that Japan's proposed taking of approximately 50 humpback and 50 fin whales in the 2007-2008 Southern summer would be unsustainable.⁶⁷²

On the very eve of the IWC meeting in mid-June, it was even reported in the media that Japan had warned that it would pull out of the IWC 'in a few years' if the moratorium is not overturned. The same report stated that Japan's 'chief negotiator' had also denied that his country 'had used aid to persuade other nations to join the body as part of a successful bid to create a pro-whaling majority'.⁶⁷³

It all seemed rather far from the IWC meeting of only three years previously, when NGOs were trumpeting the 'Berlin Initiative' and claiming to have turned the IWC around and to have made it a conservation ('preservation') treaty.

3.3.22 What happened at the IWC Meeting

Reports from the opening days of the IWC meeting, however, suggested that the environmentalist critics had indeed been alarmist in the Western media. It was reported that at the outset Japan had lost a crucial vote in failing to stop the group from discussing the fate of dolphins, porpoises and small whales - the 'small cetaceans' which are not regulated by the IWC, and not covered by the 1982 moratorium. According to one report, the '32-30 vote against a proposal to remove so-called small cetaceans from the IWC's agenda at a gathering on the Caribbean island state ... was seen as a bellwether of the balance of power'.⁶⁷⁴ 'A key vote against the measure', it was reported, 'was Belize, a small Central American country that has received aid from Japan and had been expected by environmental groups to support it on the whaling commission'.⁶⁷⁵ After the vote, Joji Morishita was reported to have downplayed his country's interest in securing a majority on the [IWC]. 'We aren't so obsessed with the majority', Morishita reportedly said; and '[w]e want to make sure we can get some countries

⁶⁷² 'Humpbacks numbers increasing, Japan says' 16 June 2006 *The Age* <http://www.theage.com.au/news/World/Japan-unsure-of-prowhaling-majority/2006/06/16/1149964709232.html#> (accessed 16 June 2006).

⁶⁷³ 'Commercial whaling ban under threat' *itv.com* 16 June 2006

http://www.itv.com/news/world_fde326bfc3da3f4d5e448886a9287745.html (accessed 16 June 2006).

⁶⁷⁴ 'Japan loses first round in whaling talks' *MSNBC.com* 16 June 2006

<http://msnbc.com/id/13366802/print/1/displaymode/1098/> (accessed 17 June 2006).

⁶⁷⁵ 'Japan, pro-whaling nations lose early vote at St Kitts conference' *Jamaica Observer* 17 June 2006 <http://www.jamaicaobserver.com/news/html/> (accessed 17 June 2006).

to accept the fact that we can at some point move to sustainable commercial hunting of whales'.⁶⁷⁶

Japan, it was reported, then lost 'a second crucial vote on Friday'. Japan had proposed bringing in secret ballots, arguably so that small Pacific and Caribbean countries could back its pro-whaling stance without criticism from environmentalists, but this proposal was defeated by 30 votes to 33, with one abstention.⁶⁷⁷ Clover writes that, in this regard, 'Japan suffered an unexpected and total defeat'. Clover then quotes Ian Campbell, Australia's Minister of the Environment, as saying that '[t]he great victory is that we have raised the levels of understanding of this issue to levels that have probably not been seen since the 1970s'; but credits 'quiet lobbying by anti-whaling countries led by Australia, Britain, New Zealand and South Africa, and environmental groups' with having 'seen off the threat, though only by the narrowest of margins'. Earlier, in the first vote of the five-day talks, according to Clover, anti-whaling nations 'managed to hold on to a majority in a vote about whether to drop an item about the conservation of small whale, porpoise and dolphin species from the agenda. The vote was won by 32 votes to 30, with one known pro-whaling nation, Senegal, absent and Denmark abstaining'.⁶⁷⁸ It is interesting to note the suggestion that South Africa had been part of the 'quiet lobbying' - this would mean at the actual meeting, of course. Probably it would have been in a fairly calm and reasonable fashion, rather than being very active - South Africa does not have a large stake in this, by comparison with the other countries in the 'Like-minded Group'.

Another description of the votes was that Japan had suffered 'a crushing defeat ... calming fear among conservationists that the country had finally won enough support to start attacking a ban on whaling'.⁶⁷⁹ Australia's federal government described Japan's failure to 'grab control' of the IWC as 'a great victory for whales'.⁶⁸⁰ It was reported that the defeats had come after the Solomon Islands, 'a nation that usually sides with Japan', had abstained on one vote and that Belize had 'unexpectedly' voted against both initiatives'.⁶⁸¹

Of interest was the behaviour of the Solomon Islands, in regard to the vote on secret ballots. It was reported that in 2005 the country had made a commitment to Australia that they would support anti-whaling nations; but had then voted with Japan. This year, however, the country abstained; therefore representing some return for Australia, which had lobbied extensively in the weeks leading up to the vote.⁶⁸²

⁶⁷⁶ *Ibid.*

⁶⁷⁷ 'Japan loses key votes at global whaling group' *Reuters* 16 June 2006

http://today.reuters.co.uk/misc/PrinterFriendlyPopup.aspx?type=topNews&storyID=2006-06-16T195126Z_01_N16224849_RTRUKOC_0-UK-ENVIRONMENT-WHALES-BALLOTS.xml (accessed 17 June 2006).

⁶⁷⁸ C Clover 'Anti-whaling nations win 'great victory' against Japan proposals' *The Telegraph* 17 June 2006

<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2006/06/17/whale17.xml> (accessed 17 June 2006).

⁶⁷⁹ 'Whaling commission defeats Japan's proposals' *The Globe and Mail* 17 June 2006

<http://www.theglobeandmail.com/servlet/story/LAC.20060617.WORLDREPORT17-5/TPstory/TPinternational/Asia/> (accessed 17 June 2006).

⁶⁸⁰ 'Govt calls whaling vote 'great victory'' *The Age* 17 June 2006 <http://www.theage.com.au/news/National/Govt-calls-whaling-vote-great-victory/2006/06/17/1149964782400.html#> (accessed 17 June 2006).

⁶⁸¹ 'Pro-whaling nations trying to rebound after early defeats' *IrelandOn-Line* 17 June 2006

<http://breakingnews.iol.ie/news/story.asp?j=186219502&p=y86zzxzx8> (accessed 17 June 2006).

⁶⁸² 'Anti-whaling countries secure victory' *ABC Online* 17 June 2006

<http://www.abc.net.au/am/content/2006/s1665270.htm> (accessed 17 June 2006). And see: 'Japan Fails to Take Control of the IWC' *Sea Shepherd News* 16 June 2006 http://www.seashepherd.org/news/media_060616_2.html (accessed 17 June 2006).

It was reported at this stage that Japan had threatened again to consider leaving the IWC if the body did not move back towards a resumption of commercial whaling.⁶⁸³ This threat has been made before, obviously, and should most probably be seen as further sabre-rattling rather than as a serious intention.

It was further reported that '[a]fter three days of bickering and accusations, the anti-whaling nations have secured all the major votes and are claiming a victory for conservation',⁶⁸⁴ and Sea Shepherd was eventually able to report that 'Japan has lost all four votes on resolutions brought before the [IWC] including the important votes on commercial whaling and the Southern Ocean Whale Sanctuary. This means that the whales have won out over the whalers but only by the slimmest of margins'.⁶⁸⁵ The cynic might argue that NGOs and the media usually seek to heighten the dramatic; but the organisation's next comment was puzzling. According to the Sea Shepherd website, the vote meant also 'that Sea Shepherd Conservation Society can once again legally intervene against illegal Japanese whaling activities in the Southern Ocean Whale Sanctuary beginning in December of 2006'.⁶⁸⁶ This was the second time Sea Shepherd had suggested this - it appears to be their understanding that Japan's killing of whales is illegal, but that a pro-vote would have made it legal. This is a strange interpretation; unless perhaps seen as nothing more than a loosely written, and dramatically heightened, justification for taking further action.

'Yesterday', Sea Shepherd continued, 'Japan failed to prevent the IWC from discussing the conservation of small cetaceans'.⁶⁸⁷ Sea Shepherd then suggested that, on the day of writing, Japan had put forward a proposal which would allow Japanese coastal communities to hunt whales. This, per the NGO, would have effectively circumvented the 1986 moratorium on commercial whaling. The vote being 30 for Japan and 31 'for the whales' with four abstentions. The abstentions were China, Solomon Islands, South Korea and Kiribati - all 'expected to have voted for the whalers'. According to Sea Shepherd, the vote prompted Joji Morishita, the Japanese delegation's spokesman, to say, '[w]e are glad this is not a secret vote. Japan will remember which countries supported this proposal and which countries said no'.⁶⁸⁸ This would be important comment ... if true. One cannot take Sea Shepherd as being entirely reliable; but other sources have given the same wording.⁶⁸⁹ It is a more clumsy threat than might have otherwise been expected from the urbane Morishita; but might show something of the emotion - and the frustration - he felt in the immediate aftermath of losing the vote.

2006).

⁶⁸³ 'Whaling summit setback for Japan' *BBC News* 16 June 2006 <http://news.bbc.co.uk/2/hi/americas/5085730.htm> (accessed 19 June 2006). See also: S Collinson 'Japan licking its wounds after whaling defeat' 17 June 2006 http://www.int.iol.co.za/index.php?set_id=1&click_id=31&art_id=qw1150533181334B215 (accessed 19 June 2006).

⁶⁸⁴ S Clarke 'Japan fails whaling bid' *ABC Online* 19 June 2006 <http://www.abc.net.au/am/content/2006/s1666088.htm> (accessed 19 June 2006).

⁶⁸⁵ 'Japan Fails in Effort to Abolish the Southern Ocean Sanctuary' *Sea Shepherd News* 18 June 2006 http://www.seashepherd.org/news/media_060618_1.html (accessed 19 June 2006).

⁶⁸⁶ *Ibid.*

⁶⁸⁷ *Ibid.* Per Sea Shepherd, 'the vote was 32 for the whales and 30 for the whalers with 4 abstentions. The 2nd vote was to introduce secret ballots. The vote was 33 for the whales and 30 for the whalers with one abstention'. *Ibid.*

⁶⁸⁸ *Ibid.*

⁶⁸⁹ See, for instance, 'Japan Loses Bid to Resume Commercial Whaling' *Environment News Service* 18 June 2006, <http://www.ens-newswire.com/ens/jun2006/2006-06-18-01.asp>; 'Japan, pro-whaling nations suffer second day of defeat at whaling conference' *Dept of Veterinary Services of Perak, Malaysia* 19 June 2006, <http://www.jphpk.gov.my/English/June06%2018.htm>; and 'Second defeat for pro-whaling nations' *Breaking News* 18 June 2006, <http://breaking.tcm.ie/archives/2006/0618/world/cwgbmhiddmhl/>.

The fourth vote, according to Sea Shepherd, ‘was a Japanese proposal to eliminate the Southern Ocean Whale Sanctuary. It needed a two-thirds majority but Japan was hoping for a simple majority to lend legitimacy to their illegal slaughter of whales in Antarctic waters’. The vote in the end was 28 for Japan and 33 ‘for the whales’ with ‘four pro-whaling nations abstaining’.⁶⁹⁰

3.3.23 *A victory for the pro-whaling side, at last*

Still seeing events through the eyes of Sea Shepherd, ‘[t]he fifth major vote, was a moral victory for Japan but it was non-binding because it required a two-thirds majority. Japan motioned for a non-binding pro-whaling declaration by the IWC that stated that the whaling ban was no longer valid and that whales are responsible for the depletion of worldwide fish populations’. Japan, per the NGO, ‘also declared nongovernmental organizations as a threat to whaling’. The motion passed by one vote with 33 nations voting for Japan; and 32 voting ‘for the whales’ with one abstention.⁶⁹¹ Sea Shepherd acknowledges that the resolution ‘was put forward by the host nation of St Kitts and Nevis’ but clearly believed that Japan was responsible.⁶⁹² In fact, it probably was not - Rune Frøvik told the present writer otherwise.⁶⁹³

⁶⁹⁰ ‘Japan Fails in Effort to Abolish the Southern Ocean Sanctuary’ *Sea Shepherd News* 18 June 2006 http://www.seashepherd.org/news/media_060618_1.html (accessed 19 June 2006).

⁶⁹¹ In full, the St Kitts and Nevis Declaration reads as follows:

EMPHASISING that the use of cetaceans in many parts of the world including the Caribbean, contributes to sustainable coastal communities, sustainable livelihoods, food security and poverty reduction and that placing the use of whales outside the context of the globally accepted norm of science-based management and rule-making for emotional reasons would set a bad precedent that risks our use of fisheries and other renewable resources; FURTHER EMPHASISING that the use of marine resources as an integral part of development options is critically important at this time for a number of countries experiencing the need to diversify their agriculture; UNDERSTANDING that the purpose of the 1946 [ICRW] is to ‘provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry [] and that the [IWC] is therefore about managing whaling to ensure whale stocks are not over-harvested rather than protecting all whales irrespective of their abundance; NOTING that in 1982, the IWC adopted a moratorium on commercial whaling (paragraph 10(e) of the Schedule to the ICRW) without advice from the Commission’s Scientific Committee that such measure was required for conservation purposes; FURTHER NOTING that the moratorium which was clearly intended as a temporary measure is no longer necessary, that the Commission adopted a robust and risk-averse procedure (RMP) for calculating quotas for abundant stocks of baleen whales in 1994 and that the IWC’s own Scientific Committee has agreed that many species and stocks of whales are abundant and sustainable whaling is possible; CONCERNED that after 14 years of discussion and negotiation, the IWC has failed to complete and implement a management regime to regulate commercial whaling; ACCEPTING that scientific research has shown that whales consume huge quantities of fish making the issue a matter of food security for coastal nations and requiring that the issue of management of whale stocks must be considered in a broader context of ecosystem management has now become an international standard; REJECTING as unacceptable that a number of international NGOs with self-interest campaigns should use threats in an attempt to direct government policy on matters of sovereign rights related to the use of resources for food security and national development; NOTING that the position of some members that are opposed to the resumption of commercial whaling on a sustainable basis irrespective of the status of whale stocks is contrary to the object and purpose of the [ICRW]; UNDERSTANDING that the IWC can be saved from collapse only by implementing conservation and management measures which will allow controlled and sustainable whaling which would not mean a return to historic over-harvesting and that continuing failure to do so serves neither the interests of whale conservation nor management; NOW THEREFORE: COMMISSIONERS express their concern that the IWC has failed to meet its obligations under the terms of the ICRW; and DECLARE our commitment to normalising the functions of the IWC based on the terms of the ICRW and other relevant traditional law, respect for cultural diversity and traditions of coastal peoples and the fundamental principles of sustainable use of resources, and the need for science-based policy and rulemaking that are accepted as the world standard for the management of marine resources.

Resolution 2006-1, ‘St Kitts and Nevis Declaration’; ‘Chairman’s Report - Annex C’ in: G P Donovan (ed)/IWC *Annual Report of the International Whaling Commission 2006: Covering the 2005-2006 Financial Year and the 58th Annual Meeting held in St Kitts & Nevis in 2006* Cambridge: International Whaling Commission, 2007 at 68.

⁶⁹² ‘Japan Fails in Effort to Abolish the Southern Ocean Sanctuary’ *Sea Shepherd News* 18 June 2006 http://www.seashepherd.org/news/media_060618_1.html (accessed 19 June 2006). See also ‘Greenpeace Whaling Protest Disrupted in St Kitts, Ten Arrested’ *Environment News Service* 21 June 2006 <http://www.ens-newswire.com/ens/jun2006/2006-06-20-03.asp> (accessed 21 June 2006).

⁶⁹³ *Personal communication* Interview with Rune Frøvik, Reine, Lofoten, Norway, 26 April 2007; E Couzens.

Amongst other shocked reactions to the vote, it was reported that ‘Japan and its allies won a pro-whaling vote for the first time in two decades on Sunday’ when ‘a majority of nations at the [IWC] approved a non-binding declaration that criticized a 1986 moratorium on commercial whaling, blamed whales for depleting fish stocks and said nongovernmental organizations were a threat’.⁶⁹⁴ It was further reported that ‘[t]he resolution, approved 33 to 32 with one abstention, declares that the moratorium on commercial whaling was meant to be temporary and is no longer needed’. The same report averred that the Declaration had been drafted by ‘six Caribbean nations and backed by the major pro-whaling nations Norway, Iceland, Japan and Russia’. It is unknown why the report describes Russia as a ‘major pro-whaling nation’ - Russia’s position is far more ambiguous. In further reaction, quoted in the same media report, Rune Frøvik (of the pro-whaling group High North Alliance) said that ‘[t]his shows the power balance is shifting, but it really shows that both sides need to sit down, compromise and stop yelling from the trenches’; and Glenn Inwood, a spokesman for the Japanese delegation, was described as saying that the vote was ‘a historic moment’, ‘the first serious setback for those against whaling in years’ and that it was now ‘only a matter of time before the commercial ban is overturned’.⁶⁹⁵

It was reported that ‘Japan was jubilant’; and that ‘a foreign ministry spokesman in Tokyo hailed the passage of a resolution critical of the ban’ as ‘a significant step forward’.⁶⁹⁶ Another report put the sense of victory far more strongly; suggesting that ‘[t]he environmental movement suffered one of its greatest reverses late last night when pro-whaling countries, led by Japan, gained control of the [IWC] and immediately began undermining the 20-year-old ... moratorium. In a stunning diplomatic coup, Japan and its allies, including Norway and Iceland, won a voting majority in the IWC for the first time’.⁶⁹⁷ ‘Denmark’, the same report continued, ‘was one of 33 countries that voted in favour of a resolution by the host nation St Kitts and Nevis, declaring that the “IWC has failed to meet its obligations” and that it needed to be “normalised”...’.⁶⁹⁸ According to a report, however, ‘Australia has promised to fight back’.⁶⁹⁹

⁶⁹⁴ ‘Japan wins first pro-whaling vote in two decades’ *ABS News/Reuters* 18 June 2006

<http://abcnews.go.com/Technology/wireStory?id=2091442&technology=true> (accessed 19 June 2006).

⁶⁹⁵ A Raney ‘Majority of Commission Votes to Resume Whaling’ *washingtonpost.com* 19 June 2006

http://www.washingtonpost.com/wp-dyn/content/article/2006/06/18/AR2006061800786_pf.html (accessed 19 June 2006).

⁶⁹⁶ J McCurry ‘Japan welcomes vote against whaling ban’ *The Guardian* 19 June 2006

<http://www.guardian.co.uk/print/0,,329508679-105193,00.html> (accessed 28 September 2006).

⁶⁹⁷ D McNeill ‘Japan seizes control of whaling group after historic vote’ *The Independent* 19 June 2006

<http://news.independent.co.uk/environment/article1090433.ece> (accessed 19 June 2006).

⁶⁹⁸ *Ibid.* It was reported that ‘... [p]ro-whalers erupted into spontaneous applause when the result of the vote was announced.

The win stunned conservationists, many of whom believed that Denmark was in the anti-whaling camp’. *Ibid.* It was also reported that ‘the [IWC] meeting at Frigate Bay, St Kitts, erupted in shouting and finger-pointing after the vote on the resolution, ... The Japanese applauded and the winners shouted, “Sore losers!” when whaling opponents tried to continue debating after the vote. Some representatives of anti-whaling countries were booed and shouted down after yelling that Iceland should not be considered a voting IWC members because it had previously dropped out. The Irish delegate held his head in his hands in despair’. ‘Setback for anti-whaling countries’ *Daily News* 19 June 2006 at 4. See also: ‘Minister in world plea on whaling’ *The Guardian* 19 June 2006 <http://www.guardian.co.uk/uklatest/story/0,,5896255,00.html> (accessed 19 June 2006).

⁶⁹⁹ ‘Japan wins narrow pro-whaling vote’ *Sydney Morning Herald* 19 June 2006

<http://www.smh.com.au/news/World/Japan-wins-narrow-prowhaling-vote/200606/19/1150569242540.html#> (accessed 19 June 2006). It was reported that Joji Morishita, Japan’s alternate commissioner at the IWC, had said that ‘[a]nti-whaling countries might see this as an ending, ... [but] ... [t]his is the beginning of a new time for the IWC’ ... Morishita apparently then added that he ‘wouldn’t be surprised’ if the next year witnessed a frantic IWC recruitment drive by both sides’. ‘Japan wins narrow pro-whaling vote’ *Sydney Morning Herald* 19 June 2006 <http://www.smh.com.au/news/World/Japan-wins-narrow-prowhaling-vote/200606/19/1150569242540.html#> (accessed 19 June 2006). See also M Christie ‘Japan wins pro-

It was reported in the Norwegian media that '[f]ans of Norwegian whaling were triumphant Monday after the [IWC] approved a resolution that may finally make Norway's controversial annual whale hunt legal'.⁷⁰⁰ This is a somewhat odd description to find in a Norwegian media article; as it implies that the Norwegian hunt is not currently legal. Certainly, members of the Norwegian government would take exception to any charge that the country is not acting legally in taking whales. The report continued, arguing that 'the anti-whaling sentiments within the [IWC] appear to be shifting. Norway, Japan and other whaling nations like Iceland and Russia gathered enough support from Caribbean and African nations to push through a resolution that symbolically expresses an intention to ultimately allow commercial whaling once again'.⁷⁰¹ It is certainly of interest that several reports have described Russia as being 'pro-whaling'. Although bolshy and self-interested, Russia has in recent years tended to favour the anti-whaling group. Were Russia to consider resuming commercial whaling, however, it would be a dramatic step.

3.3.24 *Ongoing perceptions*

According to a report published as the meeting ended, there is much evidence in St Kitts and Nevis of Japanese-funded construction; and that 'in the course of the voting at the IWC in St Kitts ..., St Kitts delegates voted yes to every vote called by Japan, culminating in the key ballot over the so-called St Kitts Declaration late on Sunday night - a resolution pronouncing the moratorium invalid and calling for it to be scrapped'. In probably overly dramatic language, the report suggested that 'in that vote, the decade-long, multimillion-dollar effort by the Japanese to gain the backing of small Caribbean and African states in the IWC finally paid off - they won, by a single vote, and ushered in a new era in the battle to save the whale'. It is probably far too wild a claim - that the vote 'ushered in a new era' - ultimately, it was just a vote, by a temporary majority, on a guideline. Further, the report suggested that '[f]or the first time since the moratorium was introduced in 1986, the pro-whaling countries ... have the bit between their teeth and feel things are going their way'.⁷⁰²

According to Greenpeace the legitimacy of the St Kitts declaration vote 'remains in serious question'; with the basis for the contention being that 'a number of countries have tabled serious reservations and disassociated themselves from the resolution'. Greenpeace then described the 'so-called declaration' as a 'whalers' wish list, peddling predictable and well

whaling vote, first in two decades' *Reuters* 19 June 2006

http://za.today.reuters.com/news/NewsArticle.aspx?type=topNews&storyID=2006-06-19T061512Z_01_BAN922486_RTRIDST_0_OZATP-ENVIRONMENT-WHALES-200606 (accessed 19 June 2006). See

also R Booth 'Whalers secure crucial vote win in bid to overturn ban' *The Guardian* 19 June 2006 <http://www.guardian.co.uk/print/0,,329508362-108018,00.html> (accessed 19 June 2006).

⁷⁰⁰ N Berglund 'Norwegians cheer shift on whaling ban' *Aftenposten English Web Desk* 19 June 2006

<http://www.aftenposten.no/english/local/article1357250.ece?service=print> (accessed 19 June 2006). It was reported that: '... "[t]he resolution maintains that the IWC must do that which it was meant to do: manage the whale population," said Karsten Klepsvik, a former Foreign Ministry spokesman who now is the national commissioner of Norwegian whaling. "It sends an important signal"...'. *Ibid.*

⁷⁰¹ *Ibid.*

⁷⁰² D McNeill & M McCarthy 'How Japan's thirst for whale-blood bought prosperity to St Kitts' *The Independent* 20 June 2006 <http://news.independent.co.uk/environment/article1090875.ece> (accessed 20 June 2006).

rehearsed rhetoric, about cultural heritage, food security and poverty'.⁷⁰³ The vote would have been tied, and have failed, if Denmark had not broken ranks with its fellow EU countries.⁷⁰⁴

Shortly after the IWC meeting, it was reported in the British media that the Japanese government had 'inadvertently revealed how it [the St Kitts Declaration vote success] was done: by buying the votes it needed'. The averment was supported with an account of the 'marine aid to developing countries' which Japan's government had admitted to; Japan having apparently acknowledged 'donating 617 million yen (£2.9m) last year to St Kitts and Nevis, the Caribbean nation that hosted the IWC conference. Japan also gave £5.6m to Nicaragua, while the Pacific island cluster of Palau got £2.7m'.⁷⁰⁵

The trouble with the argument is that Japan admitted donating the money; but not to linking it to IWC votes. It is impossible to prove that Japan would not have given the aid without a commitment to voting in a particular way, even if such linkage is implied. Unnamed 'conservationists', according to the report, say that Japan 'has been known to pay the IWC subscriptions of poorer members such as Togo, which turned up late to the conference with its \$10 000 membership fee in cash, although such allegations have never been proved'. The conclusion is slightly more measured; being that 'the latest information is the most detailed yet on Japan's grants to its supporters and will lead to calls for further investigation into the ties between foreign aid and pro-whaling votes'.⁷⁰⁶ Japan, however, denied that it had 'bought' votes; Morishita pointing out that Japan had given aid to more than 100 countries.⁷⁰⁷

3.3.25 IWC 59, 2007

The 59th Annual IWC Meeting in 2007 was held in Anchorage, Alaska, USA, from 26 to 31 May.⁷⁰⁸

At the end of 2006, the present writer asked Kleinschmidt about the prospects for a shift in attitude by the United States, given the events of Shimonoseki and Cambridge in 2002. Kleinschmidt said:

⁷⁰³ 'Japan wins St Kitts declaration vote at IWC' *Greenpeace* 19 June 2006

http://weblog.greenpeace.org/oceandefenders/archive/2006/06/japan_wins_st_kitts_decla.html (accessed 23 June 2006). In the end the vote ran 33:32:1. Voting in favour of the St Kitts Declaration were Antigua and Barbuda, Benin, Cambodia, Cameroon, Cote d'Ivoire, Denmark, Dominica, Gabon, Gambia, Grenada, Guinea, Iceland, Japan, Korea, Kiribati, Mali, Marshall Islands, Mauritania, Mongolia, Morocco, Nauru, Nicaragua, Norway, Palau, Russian Federation, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Senegal, Solomon Islands, Suriname, Togo, Tuvalu. Voting against were Argentina, Australia, Austria, Belgium, Belize, Brazil, Chile, Czech Republic, Finland, France, Germany, Hungary, India, Ireland, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Oman, Panama, Portugal, San Marino, Slovak Republic, South Africa, Spain, Sweden, Switzerland, the UK, and the US. There was one abstention - China; and one country was absent for the vote - Guatemala. *Ibid.*

⁷⁰⁴ See 17.1.5, (n 611) and (n 2291).

⁷⁰⁵ D McNeil 'Revealed: Japan's Whaling "Shopping List"' *The Independent* 24 June 2006

<http://news.independent.co.uk/world/asia/article1096046.ece> (accessed 26 July 2006) and at <http://commondreams.org/cgi-bin/print.cgi?file=/headlines06/0624-05.htm> (accessed 26 July 2006).

⁷⁰⁶ *Ibid.*

⁷⁰⁷ *Ibid.* See also: 'Japanese Bribery Revealed - Sea Shepherd Charges Yakusa Connection with Whaling' *Sea Shepherd News* 16 July 2006 http://www.seashepherd.org/news/media_060716_1.html (accessed 26 July 2006). See 16 generally.

⁷⁰⁸ The present writer contacted the South African Minister of Environmental Affairs and Tourism in early 2007 and sought permission to join the South African delegation to IWC 59. Permission was granted, and the writer participated as a delegate.

the Alaskan whaling is coming up for review now ... and I wd say that the chances of horse-trading are great again ... the American delegations, in the context of the management plan that has been the debate for the last little while ... the Americans were seeking solutions for two reasons: they needed badly Japanese support for their Alaskan Inuit quota ... and the Chairperson of the Finance Committee that dealt in the Senate with fisheries ... happens to be an Alaskan Senator at the moment⁷⁰⁹ ... and that has, so I was told by some people, had a major effect ... he basically said 'you deliver me that quota ... short of that your behaviour is not concomitant with American interests' ... I think there has been a bit of a feeling on the floor at the IWC for the last two years that American views were no longer trustworthy ... that they were playing a third role ... somehow trying to bridge something ... you cd argue that this was a very statesmanlike approach to break the impasse the IWC is in ... it could also be related to their immediate self-interests ... but from a foremost anti-whaling delegation, the delegation suddenly became more muted ... and didn't play it as hard as they used to ... distinct attitudinal change, and I think it had something to do with that ... so in 2007 I think you will see a repeat of the issue that happened in Shimonoseki in 2002 ...⁷¹⁰

This was the issue which most protagonists appeared to expect would dominate at IWC 59.

3.3.26 The Like-minded Group

Throughout IWC 59 in Anchorage, there were meetings - bilaterals, small groups, and larger coalitions. One always had the sense that things were busy; that much was happening behind the scenes; that innumerable deals, half-deals, promises and vague commitments were being made continually. That, even where no actual deals were being struck, parties were all insatiably trying to find out what others' positions were; and how others' views might change, no matter how slightly. There also was, in my opinion, a pervasive sense of something that approached paranoia - everybody present seemed to want to know about any possibility of there being any 'moves' to broker deals or switch stances. This played out visibly in the concern many delegates showed about South Africa's Minister of Environmental Affairs and Tourism attending - something that had not happened before. The concern seemed to be that this might presage a significant change in South Africa's position.

The present writer's perception of the so-called 'Like-minded Group'⁷¹¹ (the anti-whaling bloc) was that the main issue was indeed aboriginal subsistence whaling - and that states were worried about the possibility of Japan orchestrating the blocking of the bowhead quota from a distance, even though Japan had apparently given private assurances that it had no plans to block this quota. States seemed to be worried about the potential for disruption that the aboriginal issue held - the events of Shimonoseki in 2002 being alluded to several times. Also, states were concerned about the role that Russia might play; and about the potential for disruption caused by Greenland seeking to increase its quota, and to begin taking humpback whales. Further, states were very concerned that 'bundling' of issues and quotas might lead to the necessity of unwelcome compromises. Generally consensus seemed to be that the matter of

⁷⁰⁹ This being a reference to Ted Stevens, an extremely powerful figure in US politics - having been in the Senate for 40 years. His influence may diminish somewhat in future, however, after he was convicted in October 2008 of seven felonies related to corruption - although he was re-elected as Alaskan Senator several days after his conviction. See, for instance, N A Lewis 'Alaska Senator Is Guilty Over His Failures To Disclose Gifts' *The New York Times* 27 October 2008; http://www.nytimes.com/2008/10/28/washington/28stevens.html?_r=1&hp (accessed 30 November 2008).

⁷¹⁰ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. Also, email from H Kleinschmidt to E Couzens; 10 October 2008.

⁷¹¹ Although countries such as Australia, Germany, New Zealand, and the UK are often described - on their own - as being the 'Like-minded Group', in fact it is a fairly large group of states basically including all of the EU states and others which consistently vote against moves to resume commercial whaling.

aboriginal subsistence whaling should be wrapped up as fast as possible; with the concern being that the longer it was kept open, the more Japan might try to create linkages. Further, it seemed generally agreed that there needed to be a Resolution on CITES; and that a strong message needed to be sent on the matter.⁷¹²

3.3.27 IWC 59 - Day 1

IWC 59 opened with a new logo - in the shape of a bowhead whale, rather than the usual sperm whale symbol of the IWC.⁷¹³ After the opening ceremonies, which involved displays by dance groups from Barrow in Alaska, Chukotka in the Russian Federation and the Makah Tribe in Washington State, the Commission began by considering the Scientific Committee's report on the status of various stocks of large whales. The Commission was chaired by Dr William Hogarth, of the US.⁷¹⁴

It seemed to me, observing, that by putting so much emphasis on the importance to the US of obtaining its bowhead whale quota; the US, and the other states in the Like-minded Group, were possibly playing into Japan's hands. From private conversations and preparatory negotiations attended, I gained the impression that there was no 'back room' deal between the US and Japan, despite the suggestions of 'assurances given'; and that the US was genuinely worried about the possibility of the bowhead quota being blocked.

The new member states were then invited to deliver oral opening statements. Ecuador explained that the Latin American countries had been meeting on the issue - and that Costa Rica had returned to the Commission after a long absence. To me, the implication of this was, again, that Latin American countries had decided to assert themselves. Beyond this, Ecuador explained that it felt more attention should be paid to non-lethal research and management.⁷¹⁵ Slovenia stated that it was very aware of the endangered status of whales; and that its policy was to oppose all whaling, except for limited aboriginal subsistence whaling.⁷¹⁶ Croatia explained that there are a number of species of whale in the Adriatic Sea, although only two dolphin species are permanent residents; and that all species of whales are protected in Croatian legislation.⁷¹⁷ Greece stated that it is our responsibility to protect the planet; and that primary education is needed in schools.⁷¹⁸ Guatemala and Laos gave opening statements also; with Laos suggesting that management of fisheries on the high seas is essential, and that Laos had joined to work toward contributing to efficiency.⁷¹⁹

On stocks of large whales, the Scientific Committee (SC) reported that it planned in 2008 to hold an intersessional meeting on Antarctic minke whale stocks; with this being a high priority

⁷¹² Personal notes; IWC 59, 28 May 2007. [I have been extremely circumspect on the attitudes of the Like-Minded Group, which met in private strategy sessions several times, in order not to betray confidences.]

⁷¹³ The opening ceremonies included several pleas for recognition of aboriginal cultural whaling by persons such as Alberta Stephan, an elder of the Native Village of Eklutna; Ted Stevens, the US Senator for Alaska; and Sarah Palin, Governor of Alaska.

⁷¹⁴ IWC 59 'Press Release - Day 1 - Monday 28 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷¹⁵ Personal notes; IWC 59, Plenary session, Day 1, 28 May 2007.

⁷¹⁶ *Ibid.*

⁷¹⁷ *Ibid.* It was not clear that Croatia understood that it had raised the thorny issue of small cetaceans; or that the species of cetaceans which it had mentioned were not subject to IWC control.

⁷¹⁸ *Ibid.*

⁷¹⁹ *Ibid.*

as there is no current agreed estimate. The SC advised that it hopes to reach agreement by the 2008 IWC meeting. By and large, the SC reported that various stocks are either stable; or are slowly increasing - such as the Southern Hemisphere blue whale, which remains at a tiny fraction of its unexploited population size but which appears to have increased at around the rate of 8% per year for the period 1978/9 to 2003/4 (with the current population appearing to be around 2 300 individuals).⁷²⁰ Western North Pacific gray whales (Sakhalin Island whales) and North Atlantic right whales continue, however, to be critically endangered; with population numbers of around 120 and 300 respectively.⁷²¹

Both Australia and New Zealand made fairly emotional appeals from the floor to Japan to abandon its plan to introduce humpback whales to the list of whales taken for research purposes; with the New Zealand Commissioner in particular suggesting that humpbacks are an iconic species - to New Zealanders perhaps even more so than are any other whales. Japan replied, in a conciliatory way, that more dialogue was needed; and that they were open to this.⁷²²

The Commission discussed cooperation with other international organisations - concurring that such cooperation is 'an important part of its work, especially in the scientific arena'.⁷²³

The Commission then received a report from its Working Group on Whale Killing Methods and Associated Welfare Issues.⁷²⁴ Attention had apparently been drawn, during the Working Group meeting, to the issue of suffering caused to whales entangled in fishing gear; and the Commission agreed, by consensus, to hold a one-day workshop in conjunction with the 2008 meeting to address welfare issues related to large cetaceans, where these are entrapped and cannot be released alive.⁷²⁵ The Scientific Committee apparently 'emphasised the potential danger' involved in trying to disentangle large whales; and stressed that the 'most valuable use of disentanglement data is for developing new fishing gear and practices' - especially where entanglements are 'inhibiting the recovery of extremely endangered species or populations'.⁷²⁶ On this issue, Argentina advised that the Latin American group wanted to see more action - instead of 'speaking but saying nothing;' with phrases like taking 'greater care' and doing 'more analysis'.⁷²⁷

In the Commission, at this point, NAMMCO raised - and 'clarified' - issues concerning a workshop which it had held in November 2006 on 'problems of struck and lost animals in

⁷²⁰ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 1-2.

⁷²¹ *Ibid* at 1-2. See 18.2 generally.

⁷²² Personal notes; IWC 59, Plenary session, Day 1, 28 May 2007.

⁷²³ IWC 59 'Press Release - Day 1 - Monday 28 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>. See Annex D on other organisations generally.

⁷²⁴ *Ibid*.

⁷²⁵ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 2.

⁷²⁶ IWC 59 'Press Release - Day 4 - Thursday 31 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 6.

⁷²⁷ Personal notes; IWC 59, Plenary session, Day 1, 28 May 2007.

seal, walrus and whale hunting.’ NAMMCO further ‘noted its competency under UNCLOS to manage cetaceans’.⁷²⁸ From the floor, the NAMMCO representative said that NAMMCO ‘has never distinguished between aboriginal subsistence whaling and coastal whaling’; and that, in its view, ‘whales are no different from other species’. NAMMCO then stressed that ‘the IWC is *not*, as some countries still seem to believe, the only competent organisation’.⁷²⁹

Six new countries had joined the IWC, bringing the total membership to 76. 71 of these were present.⁷³⁰ Cameroon, Kenya, Nicaragua, the Solomon Islands and Togo were not present - these countries not having paid their dues.⁷³¹

By the end of the first day, the general feeling on the floor seemed to be that the meeting had been very relaxed; in stark contrast to other meetings in recent years.

3.3.28 South Africa’s written Opening Statement

South Africa presented a written Opening Statement in which the country stated that its policy ‘regarding the utilisation of its whale resources is to reserve these exclusively for non-consumptive use, particularly through boat- and shore-based whale-watching’. South Africa then stated that it believed that, generally, ‘ecotourism, and in this case whale-watching, is a medium that could significantly boost the sustainable development of economies in the developing world which will consequently engender positive spin-off benefits for neighbouring non-coastal states’.

3.3.29 IWC 59 - Day 2

On the second day, the Commission began considering the issue of aboriginal subsistence whaling; first considering the report of its Sub-Committee on Aboriginal Subsistence Whaling. Taking into account the advice of the Scientific Committee, the Commission then agreed on five-year renewal periods, as the usual term in recent years, for bowhead whales from the Bering-Chukchi-Beaufort Seas stock - to be taken by the indigenous peoples of Alaska and Chukotka; for Eastern North Pacific gray whales (to be taken by the indigenous Chukotkan people); and for humpback whales (to be taken by the indigenous people of St Vincent and the Grenadines). The numbers decided upon were 280 bowhead whales for the period 2008-2012 (with no more than 67 whales to be struck in any one year, and up to 15 unused strikes to be carried over each year); 620 gray whales for the same period, with a maximum of 140 in any one year; and no more than 20 humpback whales for the seasons 2008-2012. Discussions on whales to be taken from Greenland continued.⁷³² The catch limits, as requested, for the Alaskan, Chukotkan and St Vincent and the Grenadines, remained the

⁷²⁸ IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 2.

⁷²⁹ Personal notes; IWC 59, Plenary session, Day 1, 28 May 2007. See 8.3 generally.

⁷³⁰ IWC 59 ‘Press Release - Day 1 - Monday 28 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷³¹ Personal notes; IWC 59, Plenary session, Day 1, 28 May 2007. Guinea-Bissau’s dues were paid partway through.

⁷³² IWC 59 ‘Press Release - Day 2 - Tuesday 29 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>.

same as for the period 2002-2007; the request from Greenland differed in that higher numbers of minke whales were requested, and additional species were requested.⁷³³

In debate before the decision, the US based its plea for a bowhead quota on the Scientific Committee report, and on the contention that the ‘uncertainties’ of 2002 have ‘been dealt with’. Most countries who spoke did so in support of the granting of the quota. India did suggest that a programme to reduce aboriginal dependence on this food source was needed. Morocco and Benin, with support from Senegal, both asserted that all aboriginal subsistence whaling should be dealt with globally; and St Vincent and the Grenadines offered its support - ‘as for all aboriginal subsistence whaling’.⁷³⁴ Japan then stated that its policy on whaling ‘is well-known - science-based and on sustainable utilisation’. Japan ‘congratulated’ the ‘American, Japanese, Norwegian and other scientists in the Scientific Committee’. ‘Based on our own policy’, said Japan, ‘and on the spirit of consensus’ it would support the proposal; but then added the loaded remark that ‘[we] only ask that [the] same criteria be applied to our coastal whaling later’.⁷³⁵ Iceland stated that it was ‘happy’ to note the ‘general support for sustainable whaling’; and added, with heavy sarcasm, that it ‘will be interesting to see if we’ll have similar support later - or several u-turns’.⁷³⁶ The Latin American bloc continued to assert itself - Argentina supporting the proposal ‘fully ... but at same time we also request reciprocity, and to respect our initiatives, and to respect non-lethal uses ... respect not denying sanctuaries’. Brazil ‘added its voice to Argentina’s - supporting, ‘but expect[ing] reciprocity on non-lethal use’. Costa Rica supported Argentina and Brazil.⁷³⁷ Other countries which spoke in support were Denmark, Finland, Gabon, Germany, Guinea, Mali, Mexico, Monaco, Norway, Russia, South Korea, Spain, St Lucia, Sweden, and Switzerland.⁷³⁸

The proposal was therefore adopted by consensus - to much applause, and a feeling of palpable relief among the countries comprising the Like-minded Group. However, to me it seemed as though Japan had - despite apparently promising behind the scenes not to link the bowhead quota with other issues - created just such linkage ... very cleverly. It also seemed to me, at this stage of the meeting, that the Chair - who was receiving praise for the amiable tone of the meeting - was in fact handling matters fairly weakly; it was because of Japan’s unexpected acquiescence and conciliatory tone, and the Like-minded Group’s nervous anticipation of Japanese filibustering, that the meeting was proceeding in good spirit.

The Russian Federation then put forward its request for a quota of gray whales for its Chukotkan people; explaining that its people needed their traditional nutrition source, especially as a new problem has arisen in the last ten years - ‘stinky’ (or inedible) whales.⁷³⁹ The US then joined Russia in the request; advising that its Makah people want 620 gray

⁷³³ IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 2-3. See 10.

⁷³⁴ Personal notes; IWC 59, Plenary session, Day 2, 29 May 2007.

⁷³⁵ *Ibid.*

⁷³⁶ *Ibid.*

⁷³⁷ *Ibid.*

⁷³⁸ *Ibid.*

⁷³⁹ *Ibid.* ‘Stinky’ gray whales are whales which, since the late 1960s, have been caught and found to have strong medicinal smells and to cause medical problems, at least in the short term, if eaten. Despite much chemical analysis, the cause has not been ascertained to date. The numbers have increased in recent times, and it has been estimated that approximately 10% of gray whales taken are ‘stinky’.

whales over a five year period - up to 140 in each year. Japan expressed its support; suggesting that it supported 'science-based management' and that it wished the Makah good luck - the Makah having taken only one whale since 1999.⁷⁴⁰ Support was then given by Benin, Côte d'Ivoire, Cambodia, Denmark, Finland, Guinea, India, Italy, Mali, Mexico, Monaco, Morocco, Norway, and the UK. However, a number of the countries which spoke in support of the proposal took the opportunity to make barbed comments - and the ground for this had clearly been carefully prepared. St Vincent and the Grenadines gave its support; but said that it hoped the consensus spirit would continue. Iceland said that 'as I said earlier, [we] hope we'll see consistency for sustainable whaling'.⁷⁴¹ The proposal was then adopted by consensus.

Parties then spoke for and against the Greenland proposal - particularly on the issue of the request to take up to 10 humpback whales annually. Interestingly, Japan, Iceland (which suggested not taking an 'approach of the survival of the cutest'), and Norway all spoke firmly in support of the proposal. Norway referred, sarcastically, to serious concerns having been raised over Alaskan bowhead whales some years earlier; and pointed out that in that case an interim quota had been given. Countries then argued against the proposal - Finland, for instance, suggesting that it would be prepared to discuss a minke allocation but that it would have problems with allocating humpbacks; and Costa Rica suggesting that humpbacks are migratory and therefore a shared resource - and that 'these species cannot be treated as just something on a menu'. Monaco argued that human health was at stake, when you increase takes of whale meat - due to chemical contamination.⁷⁴²

The proposal by St Vincent and the Grenadines was then considered. Iceland again called for 'consistency in delegations' and 'for science-based whaling'. Russia lent its 'complete support' - and pointed out that it has 'some doubt' on the use of the word 'aboriginal' as they 'see it as the right of all coastal people to whale'. South Africa then spoke to support, 'congratulate science', and explain that it 'recognises the needs of coastal countries'. The proposal was then adopted by consensus.⁷⁴³

There was also a short discussion of the word 'aboriginal'. St Lucia described the word as a 'derogatory term'; and St Kitts and Nevis stated that the word was a colonial term thrust upon them, and suggested putting a working group together to 'solve this problem'. The matter was left open.⁷⁴⁴

In the afternoon, the Commission discussed progress made on the Revised Management Procedure.⁷⁴⁵ The Scientific Committee advised that it had completed its work on western North Pacific Bryde's whales; and that it would, for the next two years, turn its attention to North Atlantic fin whales. Also, that a review of central and North Atlantic common minke whales would take place in 2008. The Commission kept the agenda item on the Revised Management Scheme open.⁷⁴⁶ Although the item was kept open, it was not taken further at

⁷⁴⁰ *Ibid.*

⁷⁴¹ *Ibid.*

⁷⁴² *Ibid.*

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*

⁷⁴⁵ See 8.1.

⁷⁴⁶ IWC 59 'Press Release - Day 2 - Tuesday 29 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>. See 8.1.

IWC 59 - largely because at IWC 58 the Commission had accepted that an impasse had been reached on RMS discussions, and no formal activity was identified for work prior to IWC 59.⁷⁴⁷

The Commission then considered an Agenda item titled '[t]he Future of the IWC'. Three non-IWC meetings which had taken place in the previous year were referred to - one held in Tokyo, organised by the Government of Japan; one held in New York, organised by the Pew Foundation; and one held in Buenos Aires, organised by Latin American countries. The Commission recognised the 'difficulties in reaching consensus when views within the Commission are do polarised'; but many countries did note that 'there was positive overlap' in some of the suggestions made at the three meetings, and agreed that there was 'merit in pursuing intersessional work'.⁷⁴⁸ It was further agreed that there would be merit in pursuing this intersessional work 'through an intersessional meeting under the auspices of the IWC'; which meeting would be open to all Contracting Governments and observers.⁷⁴⁹

The Commission then began, but did not complete, discussion of a proposal to establish a South Atlantic Sanctuary within the water of which no commercial whaling would be allowed.⁷⁵⁰ South Africa's comment in discussion of the sanctuary proposal, which South Africa co-sponsored, was that South Africa is a 'range state' of the proposed sanctuary; and that the country is one with a proud record of conservation, and a stated policy on whale watching. As most large whales are migratory, South Africa said, 'we believe it (the sanctuary) will contribute to our use'. The country offered its full support and expressed the hope that all countries would do likewise.⁷⁵¹

3.3.30 IWC 59 - Day 3

The third day began with further discussion of the South Atlantic whale sanctuary. Opinion remained divided on the issue, and the proposal was put to a vote. With 39 votes in favour, 29 against, and three abstentions, the proposal (which required a three-quarter majority) failed.⁷⁵² The proposal had been submitted by Brazil, Argentina, South Africa and a number of co-sponsors.⁷⁵³

The Commission then considered matters related to socio-economic implications and small-type whaling; with Japan, as it had done in previous years, giving a presentation on the hardship allegedly being suffered by its four community-based whaling communities (Abashiri, Ayukawa, Wadoura and Taiji). Japan put forward a proposal that would allow a

⁷⁴⁷ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 4. See [8.1](#).

⁷⁴⁸ IWC 59 'Press Release - Day 2 - Tuesday 29 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁴⁹ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 11. See [3.4.2](#).

⁷⁵⁰ IWC 59 'Press Release - Day 2 - Tuesday 29 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁵¹ Personal notes; IWC 59, Plenary session, Day 2, 29 May 2007. See [15.3](#).

⁷⁵² IWC 59 'Press Release - Day 3 - Wednesday 30 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁵³ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 4.

catch by these communities. After some discussion, however, it was clear that there was no consensus; and the item was therefore left open.⁷⁵⁴ Japan's proposal was to amend the Schedule to allow for the taking of minke whales from the Okhotsk Sea/West Pacific stock for each of the years 2007-2011; with the meat and products to be used for local consumption exclusively.⁷⁵⁵

In discussion, Japan's representative, Alternate Commissioner Joji Morishita, pointed out that Japan had now for 20 years been requesting assistance for its four coastal whaling communities. He described the 'history of small-type whaling' as being a 'history of broken promises,' and then pointed out that Japan had objected to the moratorium in 1982 but that the country had been put under 'strong pressure' from the US - in terms of the Packwood-Magnusson Amendment⁷⁵⁶ - 'as we were taking fish just off Alaska'. He then suggested that Japan had 'negotiated to keep the moratorium off for two years, [if] the US would let us keep our fish quotas' - and 'withdrew our objection on [the] understanding that [the] US would keep its promise'; but added that 'two years later we lost our fish quota'.⁷⁵⁷ This, he said, was the 'start of mistrust' and the 'first promise broken'. He then referred to the moratorium and the fact that the Schedule amendment⁷⁵⁸ states very clearly that there will be a review by 1990, but that it has been 'seventeen years and nothing has happened'. He called this 'another broken promise'. He then pointed out that in 1994 the RMP was adopted by consensus;⁷⁵⁹ but that the Commission has not acted, which he characterised as 'another broken promise'. He then pointed to the RMS, which had been under negotiation 'for thirteen or fourteen years' and that 'last year [the Commission] postponed discussion' - he called this 'another broken promise'.⁷⁶⁰

Morishita then recalled that the Commission adopted Resolutions on coastal whaling in 1993, 1995, 1996, 2000, 2001, and 2004 - all of which 'recognised the needs of the four communities and the effect of the moratorium' - but, sarcastically, suggested that in the IWC the word 'expeditiously' clearly 'has no meaning'. He referred again to a 'long, long history of broken promises'. He referred to 'commerciality' as one of the reasons given for distinguishing between small-type coastal whaling and aboriginal subsistence whaling; but pointed out that 'all activities are commercial' and that 'it doesn't make sense' that Alaskan whalers could sell products from bowhead whales. He agreed that Alaskan whaling 'should be fully supported'; but that 'we should be treated the same'. He explained that Japan was not asking for a lifting of the moratorium, nor for a specific number of whales (as they were willing to negotiate on the number); that Japan was willing to accept observers, and to 'put VMS ['vessel monitoring system'] on the small vessels'. 'I kept my promises', he said, 'and supported all aboriginal subsistence whaling proposals' - as 'respect for culture and way of

⁷⁵⁴ IWC 59 'Press Release - Day 3 - Wednesday 30 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁵⁵ IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 4.

⁷⁵⁶ See 8.4.

⁷⁵⁷ See (n 832).

⁷⁵⁸ See Annex A.2.

⁷⁵⁹ See 8.1.

⁷⁶⁰ Personal notes; IWC 59, Plenary session, Day 3, 30 May 2007.

life'.⁷⁶¹ Bringing his speech toward a conclusion, Morishita said that, if the Japanese proposal was not supported, it would be 'sending a very bad message to us'; and that 'we are approaching in a spirit of compromise and willingness to talk'. 'But', he said, 'we have been waiting twenty years'; and that while Japan has 'some hope for the normalisation process' without seeing 'some tangible progress, we will have to think of alternatives'.⁷⁶²

The Commission then returned to the issue of catch limits for aboriginal subsistence whaling - in Greenland - that had not been agreed to the day before. Some progress was made, but the Chair then allowed time for further negotiations.⁷⁶³

After this, the Commission considered the issue of scientific permit whaling. The Scientific Committee had, at an intersessional meeting earlier in 2007, carried out a review of the 18-year JARPA programme - after the completion of JARPA, Japan had begun a programme known as JARPA II. In 2006/7, 505 Antarctic minke whales and three fin whales had been caught under this programme; and under Japan's North Pacific programme a total of 195 common minke, 50 Bryde's, 100 sei, and six sperm whales were caught in 2006. Iceland had taken 58 common minke whales as part of its programme.⁷⁶⁴ The Scientific Committee had apparently concurred with the conclusion of a review workshop (held in Tokyo in December 2006) that 'the results of the JARPA programme, while not required for management under the RMP, have the potential to improve management of minke whales in the Southern Hemisphere in a number of ways'.⁷⁶⁵ The Chair's press release then states that 'strong statements were made both for and against special permit whaling'.⁷⁶⁶

The Commission then passed a Resolution asking Japan 'to refrain from issuing a permit - to 'suspend indefinitely' - for JARPA II; or at least the lethal aspects thereof'.⁷⁶⁷ The voting ran 40 in favour, two against and one abstention; with 27 countries 'not participating' as they 'believed that the submission of the proposal was not conducive to building bridges within the Commission'.⁷⁶⁸

The Commission then discussed the question of 'safety at sea and protection of the environment'. After minor amendments, a Resolution on this question was passed by

⁷⁶¹ This being a strong hint that, as discussed earlier, Japan does seem to have given assurances behind the scenes that it would not seek to block the renewal of the bowhead whale quota put forward by the Russian Federation and the US.

⁷⁶² Personal notes; IWC 59, Plenary session, Day 3, 30 May 2007. Various countries then responded, with Argentina, Australia, Austria, Brazil, Costa Rica, Finland, France, India, Israel, Mexico, Monaco, the Netherlands, New Zealand, South Korea, Sweden, Switzerland, the UK, and the US speaking against the proposal. The proposal was supported by Antigua and Barbuda, Benin, Cambodia, Dominica, Grenada, Iceland, Laos, Mali, Morocco, Palau, Russia, Senegal, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines. *Ibid.*

⁷⁶³ IWC 59 'Press Release - Day 3 - Wednesday 30 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ IWC 59 'Press Release - Day 4 - Thursday 31 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report rev.doc* 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 4.

⁷⁶⁶ IWC 59 'Press Release - Day 3 - Wednesday 30 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>.

⁷⁶⁷ IWC 59 'Press Release - Day 4 - Thursday 31 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report rev.doc* 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 5.

⁷⁶⁸ IWC 59 'Press Release - Day 3 - Wednesday 30 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>. See [8.2](#).

consensus.⁷⁶⁹ The item had been placed on the Agenda by Japan, which was concerned about the harassment of its whaling fleet in the Antarctic; and by New Zealand, which was concerned about the potential for environmental damage resulting from whaling and protest activities.⁷⁷⁰ Japan screened a video and photograph presentation showing apparent dangerous harassment, by Greenpeace and Sea Shepherd, of its Antarctic whaling fleet. New Zealand explained its concern that vessels operating in Antarctica be ‘adequately equipped to do so’.⁷⁷¹

Reaction to the apparent harassment by Sea Shepherd was condemnatory on the whole; with delegates appearing to have been shocked by the conservation group’s conduct. Various delegates spoke. St Kitts and Nevis, ‘recalling’ that in 2006 ‘the Greenpeace boat invaded my country’, supported and offered to co-sponsor the Resolution. The UK stated that it was ‘no longer the flag state’ and ‘wholeheartedly condemn[ed]’ the events. St Lucia said that it was ‘appalled’ and asked what flag the Sea Shepherd ship was now carrying - stating that ‘this must be exposed ... we must make sure that none of us register these ships’. Antigua and Barbuda ‘condem[ned] strongly the deliberate acts of terrorism and violence’ and ‘call[ed] on contracting governments to revoke flag registration’; since ‘to do otherwise would send a clear message that state sponsored terrorism’. The Chair commented that he was ‘somewhat embarrassed Sea Shepherd is a US organisation’. Iceland welcomed the ‘unanimous condemnation’. Argentina said that it sought the ‘most rigorous language to condemn’; and that ‘we need to know if this vessel is flying a flag’.⁷⁷²

The issue certainly gave delegates an opportunity to let off steam - and arguably to take the opportunity with an apparent ‘third party’ to show some sense of ‘unity’ with Japan. In one sense, it seemed to me, the ‘shock and horror’ played a little falsely - as though states were using the issue to ‘prove’ to Japan that they were not against it entirely, and in that way to gain a little kudos for being ‘impartial’. In and amongst the various speakers, only a few of which are recorded above, one stood out for me. The Netherlands said that it ‘wholeheartedly’ supported the Resolution - and that the country ‘calls for investigation of the whole incident’. For the present writer, this was a wonderful example of guarded diplomacy. I knew, from having spoken to Paul Watson of Sea Shepherd on the street in Anchorage two days before, that the Netherlands was the new flag state of the Sea Shepherd ship; and, as he had mentioned to me also that he had just been speaking to the Netherlands delegates, I knew that they almost

⁷⁶⁹ *Ibid.* In summary, Resolution 2007-2 (1) states that the Commission and its Contracting Governments do not condone and in fact condemn any actions that are a risk to human life and property in relation to the activities of vessels at sea; (2) urges persons and entities to refrain from such acts; further urges Contracting Governments to have regard for the importance of protecting the environment, and in particular the fragile Antarctic environment; (3) urges all Contracting Governments concerned to take appropriate measures, consistent with IMO guidelines, in order to ensure that the substance and spirit of the Resolution are observed both domestically and internationally; (4) urges Contracting Governments to take actions, in accordance with relevant rules of international law and respective national laws and regulations to cooperate to prevent and suppress actions that risk human life and property at sea and with respect to alleged offenders; and (5) urges Contracting Governments to cooperate in accordance with UNCLOS and other relevant instruments in the investigation of incidents at sea including those which might pose a risk to life or the environment. IWC 59 ‘Press Release - Day 4 - Thursday 31 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report rev.doc* 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 5.

⁷⁷⁰ IWC 59 ‘Press Release - Day 4 - Thursday 31 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report rev.doc* 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 5.

⁷⁷¹ Personal notes; IWC 59, Plenary session, Day 3, 30 May 2007.

⁷⁷² *Ibid.*

certainly knew it too. (Argentina presumably did not know that one of its ‘allies’ was involved when making its comment that the Commission should know about the Sea Shepherd’s flag status.)

Importantly, with respect to ‘ecosystem modelling’, the Scientific Committee reviewed progress with preparations for a joint CCAMLR/IWC workshop on modelling Antarctic krill predators - probably to be held in July 2008.⁷⁷³ On the same lines, the Scientific Committee reviewed progress on collaboration with the Food and Agriculture Organisation (FAO), and in particular the Committee’s proposed participation in FAO’s ‘expert consultation on modelling ecosystem interactions for informing an ecosystem-based approach to fisheries’, for July 2007.⁷⁷⁴

The Commission then adopted a Resolution⁷⁷⁵ on the non-lethal use of whales; with 42 votes in favour, two against and two abstentions. 20 countries did not participate; on the ground that they felt that, given more time, a consensus Resolution could have been developed.⁷⁷⁶ Brazil insisted that the Resolution be put to the vote; and it left the present writer feeling that the *real* purpose behind it was that the Latin American group,⁷⁷⁷ which appeared to flexing its muscles somewhat, wished to leave IWC 59 with a successfully sponsored Resolution to its credit.

3.3.31 IWC 59 - Day 4

⁷⁷³ IWC 59 ‘Press Release - Day 4 - Thursday 31 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report rev.doc* 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 5.

⁷⁷⁴ *Ibid* at 5-6. See [Annex D.5](#) on CCAMLR; and [6.1.7](#) and [6.1.8](#) on the ‘ecosystem’ debate.

⁷⁷⁵ Resolution 2007-3, ‘Resolution on the Non-lethal Use of Cetaceans’, reads as follows:

RECALLING the objective of the 1946 [ICRW] to safeguard the natural resources represented by whale stocks for the benefit of future generations; NOTING that many coastal States, including developing countries, have adopted policies of non-lethal use of cetaceans in the waters under their jurisdiction, in accordance with their sovereign rights reinforced by, *inter alia*, the [UNCLOS] and the Rio Declaration; AWARE that most whales are highly migratory and thus shared biodiversity resources; CONCERNED that negotiations aimed at resolving the impasses at the [IWC] must address the issue of non-lethal use to take into account the interests of a substantial portion of IWC membership; NOTING that, under domestic management by coastal States, non-lethal utilization of whales is a rapidly growing activity that provides substantial socio-economic opportunities, including promoting employment in coastal communities, especially in developing countries; NOTING FURTHER that the moratorium on commercial whaling has been in effect since 1986 and has contributed to the recovery of some cetacean populations essential for the promotion of non-lethal uses in many countries; CONCERNED that whales in the 21st Century face a wider range of threats than those envisaged when the ICRW was concluded in 1946; NOTING that the Buenos Aires Declaration states that “high quality and well managed implementation of whale watching tourism promotes economic growth and social and cultural development of local communities, bringing educational and scientific benefits, whilst contributing to the protection of cetacean populations”; NOW THEREFORE THE COMMISSION: RECOGNISES the valuable benefits that can be derived from the non-lethal use of cetaceans as a resource, both in terms of socio-economic and scientific development; RECOGNISES non-lethal use as a legitimate management strategy; ENCOURAGES member States to work constructively towards the incorporation of the needs of non-lethal users of whale resources in any future decisions and agreements.

IWC 59 ‘Press Release - Day 4 - Thursday 31 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC ‘Chair’s Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)’; *Final IWC59 Chair’s Summary Report rev.doc* 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 15, Annex 3. As a minor anecdote, it was the present writer who suggested that the word ‘safeguard’ be used in the first line - early drafts of the Resolution, which the writer had sight of, used the word ‘preserve’. ‘Safeguard’ is, however, the word used in the original Convention.

⁷⁷⁶ *Ibid*.

⁷⁷⁷ A rather interesting aspect, for the present writer, was the apparent entrenching of a new bloc - that of Latin American states. I rather gained the impression that the Latin American states had decided to assert themselves at this meeting - perhaps in anticipation of presenting a solid negotiating bloc at the 2008 Meeting in Santiago. Several Latin American states raised critically, for instance, the small number of scientists from the area who are invited to attend the IWC’s Scientific Committee.

On the final day, discussion began with completion of the Agenda item on aboriginal subsistence catch limits for Greenland. The catch limits were eventually adopted by vote; with 41 in favour, 11 against and 16 abstentions, the necessary three-quarters majority was attained. The catch limits finally agreed upon for the period 2008-2012 were 19 West Greenland fin whales struck per year; 200 West Greenland common minke whales struck per year, with up to 15 unused strikes permitted to be carried over each year (and with annual review by the Scientific Committee); two West Greenland bowhead whales struck per year, with up to two unused strikes permitted to be carried over each year (and with the quota for each year only to become operative on advice by the Scientific Committee to the Commission that the strikes are unlikely to endanger the stock); and 12 East Greenland common minke whales struck per year, with up to three unused strikes permitted to be carried over each year).⁷⁷⁸ Humpback whales, originally requested, were dropped.⁷⁷⁹

A Resolution on the relationship between the IWC and CITES was passed; with 37 votes in favour, four against and four abstentions. 26 countries did not participate in the vote; on the ground that they 'believed it was inappropriate'.⁷⁸⁰ In discussion on this issue, the UK - which had promoted the Resolution - said that 'any increase in trade will put pressure on the moratorium;' and that it was 'important this meeting sends a clear message to CITES'. Support was offered by Australia, Costa Rica, India, and New Zealand.⁷⁸¹

Japan said that 'this Resolution is about the relationship between CITES and IWC' and that 'we all know the issue is the moratorium'. 'CITES', said Japan, 'has been repeatedly asking the IWC to finish [the] RMP' and the 'reason is CITES wants to make its decision based on science'. 'Last year', Japan said, 'we just postponed [the] RMS'. Japan then added the words

⁷⁷⁸ *Ibid* at 3.

⁷⁷⁹ See 10.

⁷⁸⁰ IWC 59 'Press Release - Day 4 - Thursday 31 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>. Resolution 2007-4, 'Resolution on CITES', reads as follows:

RECOGNISING that the [IWC] is the internationally competent organisation for the conservation and management of whale stocks; FURTHER RECOGNISING that the [CITES] passed Resolution Conference 11.4 (Rev. COP 12) which acknowledges the IWC as the major source of information on whale stocks around the world; NOTING that the IWC Scientific Committee continuously reviews the status of all whale stocks; NOTING that the moratorium on commercial whaling has been in effect since 1986, remains in effect and the reason for the moratorium remain valid; WELCOMING the continuing cooperation between CITES and the IWC on issues related to international trade in whale products, and urging all governments to continue to support IWC and CITES obligations with respect to this issue; FURTHER NOTING the existence of CITES Resolution Conference 11.4 (Rev. COP 12) on the Conservation of cetaceans, trade in cetacean specimens and the relationship with the [IWC] which *inter alia* expresses concern that international trade in meat and other products of whales is lacking adequate international monitoring or control, recognises that the IWC is the major source of information on whale stocks around the world and recommends that the Parties to CITES agree not to issue any import or export permit, or certificate for introduction from the sea under CITES for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the [ICRW]; NOW THEREFORE THE COMMISSION: AFFIRMS that the moratorium on commercial whaling remains in place and that the reasons for the moratorium are still relevant; EXPRESSES APPRECIATION that CITES recognises the IWC's Scientific Committee as the universally recognised international organisation with international expertise to review and evaluate the status of the world's whale stocks; REAFFIRMS the important role of CITES in supporting the IWC's management decisions with regard to the conservation of whale stocks and the importance of continued cooperation between CITES and IWC; REAFFIRMS the importance of continued cooperation between CITES and IWC with regard to the conservation of whale stocks through the regulation and management of international trade in whale products; CONSIDERS that the IWC has not yet completed the necessary measures to regulate commercial whaling; CONSIDERS that any weakening of existing restrictions on trade under CITES could have significant adverse effects on the moratorium on commercial whaling and increase threats to whales; REQUESTS Contracting Governments to respect the relationship between the two conventions and not to seek the transfer of cetacean species from CITES Appendix I. FURTHER REQUESTS the Secretariat to send a copy of this resolution to the CITES Secretariat.

IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see

http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 16, Annex 4.

⁷⁸¹ Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

‘it’s effectively dead, unfortunately’.⁷⁸² Japan then referred to Article 65 of UNCLOS⁷⁸³ and its mention of ‘plural of organisations’ and suggested that ‘if IWC cannot do its job, other organisations can’. The country then stated that it would not participate in the vote, on the ground that it thought it ‘wrong to tell other organisations’.⁷⁸⁴ Iceland, Mali, Russia,⁷⁸⁵ and St Kitts and Nevis spoke against the Resolution.⁷⁸⁶

The UK declined to withdraw the proposed Resolution, despite the requests of several countries, and pointed out that the ‘proposals to review’ that had been put to CITES COP 14 ‘were from Japan and Iceland’ and that the ‘boot’ was therefore ‘on the wrong foot’; and that the UK would press on to a vote.⁷⁸⁷

The South African delegation was consulted several times by various countries on drafts of the Resolution during the course of the first three days of IWC 59, and gave its input. The issue was debated also within the South African delegation. I think that, without breaching the trust placed in me as a delegate, I can say that there was concern expressed within the South African delegation over possible implications of the Resolution for South Africa’s position on the ivory trade at CITES COP 14. In the end, when the vote was taken, there was no South African representative at the table.⁷⁸⁸

Many strategies play out in international *fora* and it is extraordinarily difficult sometimes to determine why a state actor makes the decisions it does. In their purest form, of course, decisions are reflected in the votes which a state casts at international meetings - but even votes are not always easy to understand. Technically, there are only three ways to vote - by voting ‘yes’, voting ‘no’, or abstaining. However, when a political protest seems desirable, or one of these choices might put a state into a difficult political position, another course might be followed. By way of political protest, in 2007 many pro-whaling states, knowing that they were numerically outnumbered and bound to lose any Resolution voted on anyway, announced instead that they were ‘not participating’. Although South Africa was relatively happy with the text of the Draft Resolution on CITES, the state was concerned that it might have tricky implications for the country’s policy on the trading of elephant ivory at the CITES meeting - which was due to begin in less than a week’s time. South Africa’s choice therefore, in the knowledge that the Resolution would be passed whether South Africa voted or not, was simply to avoid the issue completely.

On the issue of Japan’s proposed Schedule amendment to allow the taking of minke whales by its four community-based communities, which had been left open as an Agenda item from the

⁷⁸² See 8.1.

⁷⁸³ See Annex D.2.

⁷⁸⁴ Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

⁷⁸⁵ Russia pointed out that it had a reservation to the moratorium, which it ‘doesn’t intend to use’, on commercial whaling; and that it had voluntarily revoked it reservation in CITES. Russia then called for the Resolution proposal to be ‘rescinded in the interest of consensus’. Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

⁷⁸⁶ Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

⁷⁸⁷ *Ibid.*

⁷⁸⁸ As a matter of interest, albeit simply with anecdotal value, reaction from other parties afterward showed different levels of understanding. For instance, I was informed by a senior member of the South African delegation that the Japanese Alternate Commissioner, Morishita, had thanked him/her for the vote on CITES - and had said that ‘it was not possible that all three delegates were out of the room at the same time’. By contrast, a representative from an NGO approached the present writer and asked where the rest of the delegation was. ‘Having coffee, I suspect’, I replied. ‘You missed a vote’, the representative said in shocked tones; and added ‘that’s very bad form!’.

previous day, there had apparently been no agreement in the Scientific Committee (which had reviewed the proposal) ‘on whether the information provided by Japan fully reflected present knowledge and uncertainty regarding stock structure, abundance and trends, anthropogenic removals and productivity’. In the Commission, then, some Contracting Governments supported Japan’s proposal; but others stated that they ‘could not’. Japan then stated that ‘requesting a vote on its proposal would further divide the organisation and provoke confrontation’; and on that basis withdrew both its proposed amendment and a draft Resolution it had also prepared.⁷⁸⁹

Before this, however, Japan had explained to the Commission that it had tried to include a new idea - that of requesting ‘the Scientific Committee to develop a species specific method’. Japan asked for adoption of its proposal by consensus, but stated that it expected ‘some opinions’, that it had no intention of entering ‘a lengthy discussion’, and that after hearing opinions on the proposed Resolution it would decide whether to withdraw the proposed Schedule amendment or not.⁷⁹⁰ After hearing opposed opinions from just a few countries (Costa Rica, New Zealand, and the US) the Chair stated that there was no consensus; and referred the matter back to Japan.⁷⁹¹

Morishita, for Japan, then said that it was clear that small-type coastal whaling was not going to be accepted as aboriginal subsistence whaling; even though Japan felt that it was ‘logical to look for a way out’ as the IWC ‘has previously recognised small-type coastal whaling’. He then explained that he had ‘no illusions’ and that ‘pushing for a vote will probably increase division’; and that he would therefore not ask for a vote. He added that he saw ‘no way out’ - and then handed the microphone to ‘his boss’.⁷⁹² Alternate Commissioner Akira Nakamae⁷⁹³ then spoke. He said that Japan had seen ‘this as a last opportunity’ but that the IWC remained divided. He said that the way the ‘discussion transpired clearly revealed dysfunctional nature and double standard at play’. Nakamae went on to say that Japan wished ‘to state that there’s a real risk that we’ll review at a fundamental level our engagement with IWC’.⁷⁹⁴

Finally, it was decided that the 2009 meeting will be held in Madeira, Portugal. It had already been decided that the 2008 meeting would be held in Santiago, Chile; with the Plenary meeting from 23-27 June.⁷⁹⁵ Apparently, the present writer was privately advised, it had been long ago determined, informally, that Madeira would host the next meeting; however, at IWC 59 Yokohama put in a bid to be chosen. Yokohama had run a display table on its bid throughout the meeting; and, at the close, presented a video display on its merits. As the video concluded, however, the Japanese delegation, withdrew Yokohama’s candidacy.

3.3.32 Personal impressions of IWC 59

⁷⁸⁹ *Ibid* at 4.

⁷⁹⁰ Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

⁷⁹¹ *Ibid*.

⁷⁹² *Ibid*.

⁷⁹³ According to the list of delegates, Minoru Morimoto was the Commissioner for Japan; however, according to my personal notes it was Alternate Commissioner Akira Nakamae who spoke at this point.

⁷⁹⁴ Personal notes; IWC 59, Plenary session, Day 4, 31 May 2007.

⁷⁹⁵ IWC 59 ‘Press Release - Day 4 - Thursday 31 May’ <http://www.iwcoffice.org/meetings/meeting2007.htm>.

One thing that did occur to me, fairly strongly, is that there is a paradox in respect of Resolutions. As these are passed by simple majority, they do not apparently have great weight - some Resolutions are rammed through, with their promoters insisting upon votes taking place, because they know that they have the numbers necessary to win them; while their opponents, realising that they cannot prevent them, either choose not to participate in the vote or make it clear that they are not taking them seriously. On the other hand, Resolutions *do* have at least a certain amount of respectability - there was no move made in 2007 to undo the St Kitts Declaration of the previous year, despite its unpopularity amongst the anti-whaling states, and the fact that it gives the pro-whaling bloc the right to argue that a majority, at least once, agreed with its views on sustainable use.

Another interesting thing, I think, is the role of the smaller states - and especially of the African states. With the exception of South Africa, they all by and large follow the pro-whaling line - even Mali, which within a few days would be co-sponsoring, with Kenya, a proposal at CITES to place a 20-year moratorium on the ivory trade. This even makes me wonder whether Mali has not been 'induced' by one side (Japan) at the IWC; and by the other (in particular by the NGO IFAW⁷⁹⁶) at CITES.⁷⁹⁷

Also, on at least one occasion an African country apparently voted in error - Senegal, as the first of the pro-whaling bloc countries to vote on the Resolution on Non-lethal Use of Cetaceans, voting 'yes.' Every other member of the pro-whaling bloc announced that it was 'not participating in the vote' and it was obvious that Senegal had not understood the vote.⁷⁹⁸ The voting was often difficult to understand, though - on one occasion, as a vote was being taken, a delegate from a country in the Like-minded Group asked the South African Commissioner which way he/she should vote. One thing that was certainly clear, however, was that the pro-whaling bloc had approached the voting with the intention of 'not participating' in many of the votes.

The present writer was advised that this was the first year in which this tactic of 'not participating' in votes was adopted; and, in my opinion, it was part and parcel of the pro-whaling bloc's approach to the meeting generally. This approach appears, to me, to have been to walk away from the meeting having lost every single point; and thereby to be able to claim the moral victory of having been stymied at every turn by an uncompromising anti-whaling bloc - and this is certainly what happened. The anti-whaling countries essentially gave not one single inch during the meeting - thereby playing into Japan's hands. Some countries, like the UK, came across as being particularly hardline. Many countries praised the US Chair from the floor for his handling of matters, the obtaining of consensus on occasion, and the general good spirit of the meeting. I considered his handling to be weak, however; and thought that it was entirely due to Japan's 'manipulation' that the meeting ran with a 'good spirit' - at least for the first two days. Even in the first two days, however, there were signs that this spirit of

⁷⁹⁶ IFAW has been particularly active in West Africa, promoting opposition to the resumption of the ivory trade. In February 2008, for instance, IFAW assisted with the holding of a conference in Bamako, Mali, at which 17 countries were represented, and which saw the formal creation of a 'united front' to push this opposition at CITES COP 14. See, for instance, 'African nations join forces to form anti-ivory trade coalition' *IFAW.org* 7 February 2008 <http://www.ifaw.org/ifaw/general/default.aspx?oid=225968> (accessed 3 June 2008).

⁷⁹⁷ See 5.3.21.

⁷⁹⁸ Personal notes; IWC 59, Plenary session, Day 3, 30 May 2007.

consensus was not going to last - the sniping from Iceland being particularly telling in this regard.

Norway was fairly quiet, generally - much more subdued than many others in the pro-whaling group. This certainly contributes to the impression I gained interviewing involved people in Norway - that the country has effectively given up on the IWC.⁷⁹⁹

In the end, IWC 59 was a curious mix of nervousness and braggadocio - petty point-scoring, grandstanding, and playing to the gallery. Many country representatives seemed to feel that they needed to make themselves visible; and many made points from the floor which were probably aimed more at their own citizenry than as substantial contributions to the debate. On the other hand, countries in the Like-minded Group appeared genuinely scared, early on, that the US bowhead quota might not be renewed - and their relief appeared genuine when this did not happen. After this, they became quite buoyed up - and some very arrogant. The countries in the pro-whaling group seemed far more orchestrated in their approach - better prepared. Many of them - with the exception of Norway, which supported but did not really enter the fray - took the opportunity to make dramatic points that would not have been out of place at a conference on racism, or human rights, or de-colonialism.

3.3.35 The conflict escalates in early 2008

The conflict in the Antarctic between the Japanese research whaling fleet and environmental protestors from both Greenpeace and Sea Shepherd has become increasingly bitter in recent years. At the end of each year, Japan sends its fleet to the Antarctic - and both Greenpeace and Sea Shepherd send ships to observe, harass and, if possible, prevent the taking of whales. The two conservation NGOs do not cooperate and, instead, there is rivalry between them concerning tactics and the types of action taken. There does not even appear to be cooperation between the two when it comes to the difficult task, early in each whaling season, of locating the Japanese fleet.

In January 2008 the conflict between the Japanese and Sea Shepherd became especially fraught, to put it mildly, when two environmental activists from the Sea Shepherd ship *Steve Irwin* boarded the Japanese whaling vessel *Yushin Maru 2*. The circumstances of the boarding, and the intention behind it, remain unclear - what is clear is that they boarded, and were then detained for several days before being released to an Australian naval coast guard vessel.⁸⁰⁰ Very little, unfortunately, is clear about what happened - the activists may have boarded with the intention of delivering a letter; or they may have boarded in the hope of being detained and provoking an international incident. Allegedly, according to Sea Shepherd, the Japanese

⁷⁹⁹ *Personal communications*: Interviews with Bjørn-Hugo Bendiksen, Reine; 26 April 2007; Turid Rodrigues Eusebio, Oslo; 23 April 2007; Rune Frøvik, Reine; 26 April 2007; Halvard Johannsen, Oslo 23 April 2007; Professor Lars Walløe, Oslo; 24 April 2007; E Couzens.

⁸⁰⁰ See, for instance, M Hodgson 'Activists are returned to anti-whaling vessel' *The Guardian* 18 January 2008 <http://www.guardian.co.uk/environment/2008/jan/18/whaling.conservaion.print> (accessed 18 January 2008); 'Japanese Whalers Make Demands for Return of Hostages' *Sea Shepherd News* 16 January 2008 'Sea Shepherd Crew Remain Hostages On The Japanese Whaling Ship' *Sea Shepherd News* 16 January 2008 http://www.seashepherd.org/news/media_080116_3p.html (accessed 18 January 2008); 'Sea Shepherd Shuts Down Antarctic Whale Hunt' *Sea Shepherd News* 17 January 2008 http://www.seashepherd.org/news/media_080117_1p.html (accessed 18 January 2008); 'The Cold War at the Bottom of the Planet to Save the Whales' *Sea Shepherd News* 17 January 2008 http://www.seashepherd.org/editorials/editorial_080117_1p.html (accessed 18 January 2008).

Institute of Cetacean Research offered to return the two men return for Sea Shepherd agreeing to stop interfering with their whaling - this gave Sea Shepherd the opportunity to label the Japanese as a 'terrorist organisation'.⁸⁰¹

In March 2008 the conflict escalated even further, with Paul Watson claiming to have been shot in the chest from the Japanese whaling vessel *Nisshin Maru*. Watson explained that he was wearing a kevlar bulletproof vest and survived.⁸⁰²

Presumably, future IWC Meetings will see Japan again approach the IWC with demands that Sea Shepherd, and perhaps also Greenpeace, be acknowledged as 'terrorist' organisations and condemned by the Commission. (The matter was discussed at the IWC's Intersessional Meeting in March 2008, and a 'Statement on Safety at Sea' issued.⁸⁰³) Presumably, also, January 2009 will see Sea Shepherd again harassing the Japanese fleet in the Antarctic; with the potential for even more violent confrontation. In May 2008 Paul Watson was quoted as saying that Sea Shepherd intends to 'make the 2008/2009 whaling season into the most spectacular display of direct action intervention yet'.⁸⁰⁴

3.4 Possibilities for change

3.4.1 *The need for change?*

The moratorium has not prevented Japan and Norway from whaling - although neither does so on the scale which they appear to desire. Norway objected formally in 1982 to the IWC's indefinite imposition of a nil quota and is therefore entitled to hunt commercially and does so. Norway maintains this objection. Japan did not object as Norway did, but takes whales commercially under the category of 'scientific research', which is allowable in terms of IWC rules. In fact, all of Iceland, Norway and Japan have at one time or another caught whales for so-called 'scientific research'. Member nations can set their own quotas for these programmes without consulting the IWC. Member states then issue permits to their own nationals to meet the quotas.

According to Broch, in 1993 the Norwegian Government decided that commercial minke whaling should resume later that year; a decision that 'was met by loud protests from various anti-whaling groups and individuals, and there were renewed threats of trade boycotts' with 'representatives of the European Economic Community' going so far as to suggest that

⁸⁰¹ 'Japanese Whalers Make Demands for Return of Hostages' *Sea Shepherd News* 16 January 2008 http://www.seashepherd.org/news/media_080116_2p.html (accessed 18 January 2008).

⁸⁰² See: 'Sea Shepherd Captain Paul Watson Survives Shooting Attempt in Antarctica' *Sea Shepherd News* 7 March 2008; http://www.seashepherd.org/news/media_080307_2.html (accessed 12 March 2008). See also: 'Japanese Scramble to Spin Shooting Story' *Sea Shepherd News* 7 March 2008; http://www.seashepherd.org/news/media_080307_3.html (accessed 12 March 2008).

⁸⁰³ See 3.4.3.

⁸⁰⁴ 'New Zealand Surrenders to the Whalers; Australia Likely to Follow. Sea Shepherd Will Fight On!' *Sea Shepherd News* 9 May 2008 (accessed 10 May 2008) http://www.seashepherd.org/news/media_080509_1.html. Greenpeace, however, apparently plans not to send an expedition in 2009; see, for instance, J McCurry 'Greenpeace launches major anti-whaling campaign in Japan' *The Guardian* 9 December 2008 <http://www.guardian.co.uk/world/2008/dec/09/japan-whale-hunting/print> (accessed 9 December 2008).

‘Norway could never join that organization as long as whaling continued’.⁸⁰⁵ The hunt did go ahead, however.⁸⁰⁶

As well as moratoria, sanctuary areas have been promoted by the anti-whaling states as a way to protect whales. Pro-whaling IWC members have used the objection procedure here too. Japan, for instance, officially objected to the creation of a sanctuary for whales in the Southern Ocean in 1994, and is thus not obliged to recognise it.⁸⁰⁷

Lyster writes that ‘[m]ultilateral treaties frequently contain provisions allowing Parties, if they wish, to release themselves from certain aspects of the treaty’; the exercise of which right is generally known as ‘making a reservation’.⁸⁰⁸ Reservations, Lyster argues, ‘are useful because they encourage States to join, and to continue to participate in, a treaty in circumstances where they are prepared to accept most but not all of its provisions. However, reservations may also provide loopholes enabling States to defend its vested interests which conflict with the spirit of the treaty’.⁸⁰⁹ As an example of negative consequences, Lyster suggests that use of the objection procedure ‘has undermined decisions of the [IWC] on a number of occasions’.⁸¹⁰ The use of the pejorative description ‘undermine’ is of course a value judgment.

Rose and Paleokrassis contrast the ICRW with the ‘EU’s Common Fisheries Policy (CFP)[, which] allows no opt-out. The CFP evolved in the 1970s as a means of ensuring EU member states equal access to each other’s fishing grounds, especially when those fishing grounds were extended through the adoption of EEZs. ... The CFP does not permit a member state to opt out of a decision to conserve fisheries in EU waters’.⁸¹¹ This does show that an international environmental treaty can be handled differently to the approach taken by the drafters of the ICRW. However, the European Union example is a strange one - involving as it does a radical giving up of sovereignty generally.

⁸⁰⁵ H B Broch ‘North Norwegian Whalers’ Conceptualization of Current Whale Management Conflicts’ in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 203 at 216. It has been explained of this that ‘[t]he decision was based upon an evaluation carried out by an international group of marine biologists who determined that the number of minke whales was sufficient to allow the safe resumption of whaling. The quota for the 1993 season was set at 160 whales, to be shared among the 36 boats. Although the whalers [in Northern Norway] claimed that the quota was too small, they were nonetheless relieved to find themselves able to set out for whales again’. *Ibid* at 216. This shows something of the complexity of the whaling debate. The whalers do not necessarily wish to destroy everything in pursuit of short-term interests.

⁸⁰⁶ *Ibid* at 216. Per Broch, ‘[t]he quota of 160 whales was filled by mid-July. However, it is interesting to note that the whalers expressed dissatisfaction with the government whaling regulations: whalers wished [] specif[i]cation of] tonnage of meat, rather than a set number of animals, ... The whalers’ reason [] was that ... [under a numerical system] the largest animals are targeted ... includ[ing] the large pregnant female whales. In the whalers’ opinion it would make more ecological and economic sense to hunt the smaller young males, whose meat tastes best, and to avoid catching so many of the pregnant adult females. Thus the whalers continue to argue their case in ecological terms even following the resumption of whaling’. *Ibid* at 216.

⁸⁰⁷ First proposed by France in 1992, this sanctuary was accepted by the IWC at its meeting in Mexico in May 1994. Only Japan voted against the proposal. Norway did not cast a vote. ‘Proposal for a widely acceptable Southern Ocean Sanctuary’ *IWC Voting Records 1994* IWC 46/53. See [15.3](#).

⁸⁰⁸ S Lyster *International Wildlife Law* (1985) at 9-10. Lyster tells us that [] ‘strictly speaking, [this is type of ‘reservation’ is] not a reservation at all although, confusingly, it is often hailed as such. It occurs when a Party registers a declaration that it does not accept a regulation adopted under convention procedures’. *Ibid* at 9.

⁸⁰⁹ *Ibid* at 9-10.

⁸¹⁰ *Ibid* at 27.

⁸¹¹ G Rose & G Paleokrassis ‘Compliance with International Environmental Obligations: A case study of the International Whaling Commission’ in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 156.

Asked whether she felt, from the perspective of the IWC Secretariat, that there were inherent problems with the IWC; Nicky Grandy said that she thinks that the Convention is ‘flexible enough to allow countries to do anything they want to do’; but that the ‘problem’ is that amongst the members there are ‘many different views about management of whaling’.⁸¹² The present writer then pointed out that Patricia Birnie has also described the ICRW as being ‘flexible’;⁸¹³ and Grandy said it was one of the first Conventions ‘which did have a conservation aspect to it’ and that she thought that ‘if the Commission decided it wanted to do something then it could do so’, but that ‘the problem is, [again,] that member countries do have very different views of what they want to see [as] priority issue[s]’.⁸¹⁴ ‘Some of the countries’, she said, ‘want to [amend] the Convention so as to remove the right to scientific whaling, and to tighten compliance’; but, she said, for that to ‘be successful, you have to have consensus, because only countries which signed up to the change would be bound by it’. ‘We did actually think about that quite extensively at the RMS Meeting in Cambridge last year’, she added, in respect of the idea of changing the Convention.⁸¹⁵ She did not conclude the sentence, but the implication is that the consideration did not lead to any positive conclusion; nevertheless, it is interesting that an IWC Sub-Committee has at least very recently considered the matter. This shows, if nothing else, the extent of the impasse problem within the IWC.

Toward the close of IWC 59 in 2007, the present writer asked the South African Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk, for his impressions of the IWC. van Schalkwyk described the ICRW as being a ‘very old Convention’; with ‘some of the procedures [being] indeed extremely outdated and strange compared to some others’. Pressed for examples of such procedures, he said:

[o]n the floor, you know, it’s actually an extremely open agenda and process where countries can come and present, you know, local communities to put their case to an international body. The volume, the load of work, of ... of ... of these kinds of bodies will simply become too much if that is allowed to happen. They need a much more modern approach here - and I think there was a general feeling by countries who did not want to say so publicly - but said who said it privately - that the body is really in need of modernisation. I was struck by the many bilaterals that we had with pro- and anti-whaling countries where people privately said we need a compromise where we must accept some of the positions of the other side in the process of compromise - but while we were on the floor there was a total unwillingness to do it ... so somehow we need to break this stalemate here ... I think it’s possible ... [but] it will require much stronger leadership.⁸¹⁶

3.4.2 *The Intersessional Meeting, March 2008*

From 6-8 March 2008 an intersessional meeting of the IWC was held in London - in an effort to chart a course forward for the IWC, and to see if it might be possible to broker a compromise.⁸¹⁷ The effort was brokered by the IWC Secretariat itself.⁸¹⁸

According to the IWC’s announcement of the meeting, at IWC 59 it was agreed by the Commission that ‘an intersessional meeting should be held prior to the 2008 Annual Meeting

⁸¹² *Personal communication* Interview with Nicky Grandy, Cambridge, 1 February 2007; E Couzens.

⁸¹³ See (n 144), (n 151), (n 223), (n 408), (n 424) and (n 873).

⁸¹⁴ *Personal communication* Interview with Nicky Grandy, Cambridge, 1 February 2007; E Couzens.

⁸¹⁵ *Ibid.*

⁸¹⁶ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens.

⁸¹⁷ ‘Intersessional Meeting on the Future of IWC’; at <http://www.iwcoffice.org/meetings/intersession.htm> (accessed 31 January 2008).

⁸¹⁸ See (n 749).

to provide an opportunity for Contracting Governments to discuss the future of the organisation, given *inter alia* the impasse reached on the Revised Management Scheme (RMS) and the number of issues for which polarisation rather than consensus appeared to be the norm within the Commission'.⁸¹⁹ At IWC 59 it had been agreed that a Steering Group, comprising the Commission Chair, the Vice-Chair, and the Commissioners for Palau, New Zealand and Chile (who had respectively chaired the Tokyo, New York and Buenos Aires meetings), would prepare a draft Agenda. Meeting in October 2007, the Steering Group 'agreed that there is an urgent need to explore ways that might be more successful and which can improve levels of trust amongst members and others' and agreed that '[t]o this end, rather than launching into negotiations on substantive issues where major differences among IWC members exist', it would 'initially' be 'more fruitful to take a process-oriented approach and to seek ways to improve how negotiations within the IWC are conducted'. The intersessional meeting, the Steering Group therefore concluded, will 'therefore focus on matters of process rather than on matters of substance and Contracting Governments will be encouraged to share their ideas on how to improve the working of the Commission'.⁸²⁰ It was stated that the intersessional meeting would be facilitated by Senior Advisor Calestous Juma.⁸²¹

3.4.3 *Results from the Intersessional Meeting, March 2008*

It was reported after the Meeting that a 'Statement on Safety at Sea' had been agreed to. This called upon the Sea Shepherd Conservation Society to 'refrain from dangerous actions that jeopardise safety at sea' - the corollary being that it called also 'on vessels and crews concerned to exercise restraint'. The Meeting apparently 'recalled' that observer accreditation has been denied to Sea Shepherd since 1987 'because of unacceptable behaviour and tactics'; and 'urged' IWC Members to take actions - in accordance with both international and national law and - to 'cooperate and suppress actions that risk human life and property at sea and with respect to alleged offenders'.⁸²² Reading between the lines, there would have been strong condemnation of Sea Shepherd's conduct - but this would have been tempered somewhat by calls for thorough investigation by Members sympathetic, or with sizeable domestic constituencies sympathetic, to Sea Shepherd.

As to actual results of the effort to find 'positive ways forward' for the IWC, the Chair of the IWC (Dr William Hogarth of the US) was quoted as saying that '[i]ntensive discussions ... isolated a number of issues that the Commission will consider in order to improve its practice and procedures'. These issues apparently included making better efforts to reach decisions by consensus; reducing the use of voting;⁸²³ adopting measures to ensure adequate notice of matters to be considered, so as to reduce surprises; employing 'cooling off' periods when difficulties arise; considering using small negotiating groups; improving co-ordination

⁸¹⁹ 'Intersessional Meeting on the Future of IWC'; at <http://www.iwcoffice.org/meetings/intersession.htm> (accessed 31 January 2008).

⁸²⁰ *Ibid*

⁸²¹ *Ibid*. Juma is Professor of the Practice of International Development and Director of the Science, Technology, and Globalization Project at Harvard University's Kennedy School of Government. Juma is also a former Executive Secretary of the United Nations Convention on Biological Diversity.

⁸²² 'Statement on Safety at Sea' Press Release of the Intersessional Meeting on the Future of IWC (London, 6-8 March 2008); <http://www.iwcoffice.org/meetings/intersession.htm> (accessed 12 March 2008).

⁸²³ Based on IWC 59, the present writer surmises that these first two issues would have been put forward by Japan and its allies - at IWC 59 the pro-whaling bloc several times 'refused to participate' in a vote on the ground that consensus might have been possible had more time been allowed for discussion. This came across as Japan's effort to appear conciliatory.

between the IWC and other relevant international conventions;⁸²⁴ discussing how to assist the Chair in the running of meetings; discussing how elements of civil society might be better integrated into the Commission's work; and considering whether to change the timing of Scientific Committee meetings in order to provide more time for consideration of its reports, and to undertake review of its composition and function.⁸²⁵

The Chair was then quoted as committing himself to producing a report of the meeting to the Commission and, in consultation with others, developing a series of recommendations to improve procedures which will 'take the Commission forward', at IWC 60 in June 2008. It is hard to know what to think of the Meeting, without having been there. On the face of it, little of significance appears to have come out of it. It seems to the present writer, however, that perhaps the most significant aspect of the process is simply that it is currently being driven by American leadership. Numerous commentators, and involved people with whom I have spoken, have suggested that the United States is the country with the potential to broker change if it chooses to.

3.4.4 IWC 60, 2008

The IWC met in Santiago, Chile in the last week of June 2008. The Meeting appears to have been relatively quiet, and to have reflected largely - as in 2007 - Japanese and American efforts to move toward some form of compromise.⁸²⁶ As a reflection of this Japan stated, on Day 3, that it would not request a vote on its proposal to relieve the 'hardship suffered by' its four community-based coastal whaling communities - Japan suggesting that it would not ask for a vote 'because of the progress it saw in the discussions related to the future of the IWC'. The Chair (the US Commissioner) then 'thanked Japan for its cooperative attitude'.⁸²⁷

As other outcomes of the Meeting, the Commission agreed that it would take steps to 'improve the practice and procedures of the Commission' and to 'further discussions/negotiations on substantive issues'.⁸²⁸ Further, a proposal on the creation of a South Atlantic Sanctuary, put forward by Argentina, Brazil and South Africa, was withdrawn - the three countries indicating that they would not ask for a vote on the issue 'in order to facilitate the work on the future of the IWC'. The Chair then apparently thanked the three countries 'for their constructive attitude'.⁸²⁹

A proposal which did go to a vote, and which the Chair described as having been 'the main issue this year' was Denmark's proposal (for West Greenland) of a strike limit of ten humpback whales (annually) for the period 2008-2012. The Scientific Committee had apparently agreed that this strike limit would not harm the population. Discussion in the

⁸²⁴ See Annex D generally.

⁸²⁵ 'Statement on Safety at Sea' Press Release of the Intersessional Meeting on the Future of IWC (London, 6-8 March 2008); <http://www.iwcoffice.org/meetings/intersession.htm> (accessed 12 March 2008).

⁸²⁶ See 17.1.

⁸²⁷ IWC 60, Press Release Day 3, 25 June 2008; <http://www.iwcoffice.org/meetings/meeting2008.htm#press> (accessed 27 June 2008).

⁸²⁸ IWC 60, Press Release Day 2, 24 June 2008; <http://www.iwcoffice.org/meetings/meeting2008.htm#press> (accessed 27 June 2008). See 17.1.

⁸²⁹ IWC 60, Press Release Day 4, 26 June 2008; <http://www.iwcoffice.org/meetings/meeting2008.htm#press> (accessed 27 June 2008). See 15.3.

Commission was focused mainly on whether the need for additional whales had been satisfactorily documented or not; and the Commission was apparently ‘deeply divided’ on this question. Put to a vote, the proposal failed with 29 votes for, 36 against, and two abstentions.⁸³⁰

Herman Oosthuizen advised me after IWC 60 that probably the most significant thing to come out of it was agreement by all countries to continue with negotiations. A task team of approximately 25 countries, including all of the major players, met in September 2008 in Tampa Bay, Florida, to consider a ‘package deal’ that might go so far as to include a limited resumption of whaling, and the bringing of small cetaceans under IWC control. Probably any package would then go to an intersessional meeting in March or April 2009 before possibly being put before IWC 61 in mid-2009. He advised also that the United States had pushed hard for this course to be followed.⁸³¹

3.4.5 *Conflicting strategies*

According to Andresen, ‘[t]he main pro-whaling countries (Japan, Iceland, and Norway) have adopted different strategies toward the more recent developments in the IWC’. He records that in respect of the 1982 moratorium resolution, Iceland did not lodge a formal objection, while both Japan and Norway did; but that Japan then ‘withdrew its objection because of pressure from the United States’.⁸³² Iceland, he observes, ‘conducted whaling for scientific purposes until 1989 but has since then conducted no whaling’; and that Iceland withdrew from the IWC in 1992. Norway, he writes, ‘quit commercial whaling in 1987 but continued whaling for scientific purposes and resumed commercial whaling in 1993’; while Japan ‘has been conducting scientific whaling only since the 1987-88 season’. His assessment is that Japan has been ‘most *loyal* in the sense that it withdrew the objection to the moratorium, conducted only scientific whaling, and remained in the IWC. Iceland chose the *exit* strategy, due to frustration with developments in the IWC. Norway has loyally remained in the IWC but made its voice heard by resuming commercial whaling’.⁸³³ As Norway, Andresen continues, ‘[has] achieved its main goal *within* the present IWC, the credibility of the threat to exit has been reduced. Norway still strongly rejects the policies of the IWC, but just as the protests of the IWC

⁸³⁰ *Ibid.* See 10.

⁸³¹ *Personal communication* Herman Oosthuizen, telephonic, 5 September 2008; E Couzens. It transpires that a second Small Working Group meeting was held in Cambridge in early December 2008. Results of the meeting were not released, but according to a Press Release on 11 December 2008 the SWG will report to an intersessional meeting of the IWC in March 2009. ‘Meeting of the Small Working Group on the Future of the IWC: Press release’ 8-10 December 2008 *IWCOffice.org* 11 December 2008

http://www.iwcoffice.org/_documents/commission/future/SWGfuture/press%20release%20Dec%2008.pdf (accessed 17 December 2008). On the earlier SWG meeting, see ‘Meeting of the Small Working Group on the Future of the IWC: Press release’ 15-19 September 2008 *IWCOffice.org* 19 September 2008

http://www.iwcoffice.org/_documents/commission/future/future.htm (accessed 29 September 2008). As very little of the content of these SWG meetings has been released, I have really included them here only for the sake of completeness. However, see 17.1 on current efforts to broker change - these movements may yet be of significance.

⁸³² Again, there appears to be consensus amongst commentators that Japan did not willingly agree to the moratorium in 1982. See (n 757).

⁸³³ S Andresen ‘The Whaling Regime: “Good” Institutions but “Bad” politics?’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 245. From this, it appears that there are three different strategies pursued severally by the three main ‘rebels’.

against Norwegian whaling have become routine, so have the Norwegian protests against the IWC'.⁸³⁴

'Japan', suggests Andresen, 'seems to be in much the same position as Iceland, not being able to hammer out a consistent high-level strategy to deal with the issue'.⁸³⁵ ... Since the whaling issue simply is not regarded as important enough, compared to wider Japanese interests, the occasional Japanese threat of leaving the IWC does not seem credible'.⁸³⁶ 'Compared', he continues, 'to the much larger and still very unified anti-whaling coalition, the pro-whaling coalition has been loose and fragmented. ... So far, the anti-whaling forces have achieved their main goal in the sense that both Iceland and Japan have been split domestically, and the fear of negative economic consequences is greater than the wish to resume whaling'.⁸³⁷ Along the same lines, Stone describes Friedheim as maintaining 'that whaling proponents have failed to make standard bargaining offers and threats' and elsewhere has cited the Japanese as having failed - for whatever reason - to orchestrate normal coalitions with their natural allies, including Iceland and Norway.⁸³⁸

As with everything else concerning the IWC, there seems little consensus even on the negotiating skills of different parties. Victor comments that 'since the end of the Cold War Iceland has been less able to link issues such as this to other matters of vital interest to the United States (e.g., NATO bases), whereas Norway's continued prominent role in world politics (e.g., the Oslo Middle East peace process) has better insulated Norway from U.S. pressure'. Japan, he says, has 'tried hard, but failed, to act strategically through the IWC. Japanese bureaucrats failed to stop the adoption of the Antarctic whale sanctuary'. He points out that Japan has failed also in its efforts to have its coastal communities, which have long depended on small-type shore-based whaling, given the same rights as aboriginal communities, which would have allowed them to continue limited whaling for local consumption. Friedheim, according to Victor, has 'convincingly documented that many of these Japanese failures were the result of poor strategies and tactics by Japanese negotiators within the IWC, exacerbated by divided positions of the Japanese government and perhaps anti-Japanese and racist attitudes within the IWC'. His conclusion on this point is that Japanese delegations have 'pursued a scientific strategy aimed at adopting sustainable management quotas, but since 1982 the IWC has been a highly politicized body for which science has been (increasingly) irrelevant'.⁸³⁹

⁸³⁴ *Ibid* at 246-47. In 1993/94 Norway resumed commercial whaling, taking 157 minke whales in the northeast Atlantic. IWC 'Chairman's Report of the Forty-Sixth Annual Meeting' (23-27 May 1994, Mexico) at 24.

⁸³⁵ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 246-47.

⁸³⁶ *Ibid* at 246-47. Andresen says that 'Iceland has been the main architect in establishing NAMMCO'; and that there has been a 'lack of support from Norway in making NAMMCO into a real alternative to the IWC. However, in contrast to Iceland, Norway was able to elaborate a unified high-level political strategy, orchestrated by the Norwegian Prime Minister Gro Harlem Brundtland. ... Norway demonstrated that it was possible to conduct commercial whaling and still be an IWC member, although the majority does not approve of it'. *Ibid* at 246-47. The Japanese threat to leave has been made since publication, however; particularly after the 'Berlin Initiative' of 2003, and at IWC 59 in 2007.

⁸³⁷ *Ibid* at 247.

⁸³⁸ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 277-78.

⁸³⁹ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 300.

The charge of Japanese naïvete seems implausible to this writer - the Japanese would, rather, appear to be the master strategists of environmental debate. They have, after all, been ‘wheeling and dealing’ within the IWC since 1951, as well as fighting environmental battles in many other arenas. However, when I interviewed Horst Kleinschmidt and asked for his opinion on this, he considered the Japanese to be bad (clumsy) negotiators. Asked whether the Japanese are ‘the real masters of diplomacy’, he said ‘[n]o, their diplomacy’s poor ... very interesting, their diplomacy’s poor ... through a serious failure to understand other peoples’ debates’. By way of example, he described himself as saying to the Japanese ‘I want you to invest in South Africa as tuna companies, and not to give me money and say we want preferential access ... because that way you treat me like a Banana Republic ... get a more sophisticated approach ... and they failed to understand, completely’. There were, he said, ‘some younger people, who said [that] the old guys just don’t get it ... no, very, very poor at diplomacy’. He then added that the relationship between the Japanese and ‘the countries that vote with them is crude, it’s basic ... they walk in there and they tell them how to vote ... they do it in front of people ... humiliate them in the process ... they give them cash money ... it’s a very, very clumsy approach’.⁸⁴⁰

‘In short’, continues Victor, ‘in the IWC the causes of unequal outcomes reflect differences in national interests and capabilities; although advocates of international society may lament the fact, it is hardly surprising that different inputs yield different outcomes’.⁸⁴¹ He suggests that it might be unjust to those countries and industries that ‘are the targets of sanctions’ as a result of the ‘extensive reliance upon US economic power’ - no state, after all, ‘in a law-bound society, should be able to impose its will on others’. But, he says, the vast majority⁸⁴² of IWC members oppose whaling, and the US is ‘merely helping to secure what they have decided should be law’. He concedes that that argument may have ‘some validity’, but says that it ‘ignores the prior question - why should the IWC, packed with like-minded states that engage in no whaling, be the arbiter of international law on whaling?’. He then concludes by suggesting that a ‘second and more important reason why US sanctions do not violate strict principles of justice is that international affairs are not strictly governed by principles of justice’.⁸⁴³

A third reason is that the U.S. can surely do what it likes within its own territory - there is no principle of international law, unless one delves perhaps into the murky waters of the WTO, to prevent a state from preventing another state from fishing within the first state’s territorial waters/EEZ.⁸⁴⁴

Day provides a cogent and useful rebuttal to the allegation of Japanese naïvete, and the depiction of them as ‘failed strategists’, when he suggests that ‘[f]or three centuries,

⁸⁴⁰ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. Also, email from H Kleinschmidt to E Couzens; 10 October 2008.

⁸⁴¹ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 301.

⁸⁴² No longer, or only narrowly so, as of 2006 and 2007.

⁸⁴³ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 301. This ‘second reason’ appears a circular argument, however.

⁸⁴⁴ There is one principle in UNCLOS that might justify a state being entitled to the surplus of the Total Allowable Catch in another state’s Exclusive Economic Zone, where that second state is unable to take the whole of its TAC, but probably this is not relevant here. See Annex D.2.

[Miyamoto] Musashi's book [*Go Rin No Sho* or the *Book of Five Rings*] has been the bible of Japanese interested in the art and science of strategy. In war, in politics and even in business practices, the Japanese have been informed by the strategies of Musashi'. He concludes even that 'the way of the samurai can certainly be observed in the manoeuvrings of the Japanese delegation to the [IWC]. There is little doubt by any concerned with the IWC that the Japanese are the master strategists of the pro-whaling forces'.⁸⁴⁵

'In Japan', he continues, 'we seem to have political intrigue essentially viewed as an art form. And as such, in the sphere of whaling issues in the Third World, it seems to be Japan's primary cultural export item'.⁸⁴⁶ According to Day, '[t]he Japanese whaling industry is largely controlled by the giant Taiyo Fishing Company, which in turn is controlled by the biggest company in all Asia, Mitsubishi, whose tentacles reach everywhere in America. And when it comes to lobbying ability, the Japanese have proved second to none'.⁸⁴⁷ This would appear to be the more plausible view of Japan; although as usual the truth probably lies somewhere between the alternatives.

Further, in the light of such comments as those of Day's, is it far-fetched to see the Japanese as linking the ivory trade to the resumption of commercial whaling - and to the extraction of hardwoods from forests in developing countries - and to see them deliberately playing CITES and the ICRW off against each other? Certainly, the linkages will not have been missed by the Japanese negotiators themselves.

Watson's scepticism of United States' politics is not reserved for Republican governments; and he suggests that in 1994 President Bill Clinton refused to sanction Norway under the regulations of the US Department of Commerce, in effect discriminating 'on the application of the law so as not to jeopardize trade relations with Norway'. Clinton, according to Watson, made the announcement on 4th October 1993; and, only four days later, the Icelanders announced plans to resume commercial whaling. Japan followed suit and threats to resume whaling began coming from Russia, Canada, Peru, the Philippines, Taiwan and Korea. 'The war against the whales', per Watson, 'had been officially reopened'.⁸⁴⁸

In recent times the anti-whaling camp has been in the ascendancy; although not with an overwhelming majority. Friedheim concedes that '[t]he existence of a seemingly powerful majority and a weaker outvoted minority might imply that the majority has won all of its objectives, the minority lost all of its rights'; but then contends that 'that is not quite true'. He then argues that 'the majority has won the big votes, created a moratorium they refuse to lift, and augmented it with a Southern Ocean sanctuary, but they have not been able to force or

⁸⁴⁵ D Day *The Whale War* (2nd ed, 1992) at 127.

⁸⁴⁶ *Ibid* at 132-34. Day writes that '[i]n 1981 Brazil abstained from the moratorium vote, and [] informed the IWC that it was getting out of the whaling business that year. In 1982 it not only remained in the business as a Japanese whaling colony but changed its abstention to a no vote against the moratorium ... The Brazilian newspaper *Folha de São Paulo* made it absolutely clear why the decision had been made. Japan had offered Brazil a \$400-million agricultural investment programme'. *Ibid* at 132-34. See (n 210).

⁸⁴⁷ *Ibid* at 135.

⁸⁴⁸ P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at 256.

convince the minority to give up all of their rights to whale. In short, preservation as a new norm has not been internalized by key states to whom it is intended to apply'.⁸⁴⁹

Interviewed, Butterworth explained to me that his analysis of the current position is that the whaling countries are pushing and trying to get a simple majority, while knowing that they can't get a two-thirds majority; as a simple majority would establish the 'moral high ground'. The other side, he felt, 'are petrified they'll do that ... but have been 'hoist by their own petard' because 'they were the first ones to play at that'. A simple majority and the moral high ground would create 'more leverage and more openings'; and that this would make it easier for the whaling countries to leave the Commission on the basis that, 'self-evidently' the anti-whaling countries would have no intention of making the IWC work and would clearly be defeating the ends of the Convention - the letter of the law being on the pro-whaling side.⁸⁵⁰

3.4.6 Politics

The argument has been made that pro-whaling states, at least at present, have more to gain by remaining inside the IWC, or at least would lose significantly by leaving - whereas to the anti-whaling states it is not truly an issue of huge significance, and they lose little by their hardline stance. Per Friedheim, 'Iceland seemed to signal that, by withdrawing from the IWC, the resumption of whaling was a highly salient issue [meaning a 'preference for achieving a favorable outcome on an issue as compared to a favorable outcome on other issues valued by a stakeholder']. But when it came to following through by resuming whaling, they hesitated, although perhaps only temporarily. The costs seemed too high'. Norway and Japan, he continues, have both claimed that whaling is an important issue to them but neither has shown 'willingness to pay a higher price to resume full-scale whaling. For them, too, the cost is too high to achieve their maximum preferred position, partly because they do receive benefits from limited whaling, however much they are scorned by anti-whaling states and NGOs'. On the other hand, he concludes, the US, the UK, France, Australia, New Zealand, and others 'claim that ending whaling is a matter of great substance to themselves. They pay a low price to achieve it'.⁸⁵¹

This assessment, however, probably understates the importance of whaling as a symbol for natural resource use in general.

The IWC does have a 'Scientific Committee' which is intended to monitor the condition of whaling stocks worldwide and make regular advisory reports based on scientific evidence. This committee meets two weeks before every IWC meeting. Enforcement of the Treaty, however, relies largely on the will of States Parties themselves.⁸⁵² The charge is often made that the recommendations of the Scientific Committee are accepted by members only when in conformity with their own interests and beliefs. Friedheim suggests that '[a]lthough the International Whaling Commission (IWC) has survived for more than fifty years, its present is

⁸⁴⁹ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 10-11.

⁸⁵⁰ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

⁸⁵¹ R L Friedheim 'Negotiating in the IWC Environment' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 215.

⁸⁵² W T Burke 'A New Whaling Agreement and International Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 70.

highly contested and its future may be in doubt.⁸⁵³ ... The contest is about *which general approach* the International Whaling Commission should take to manage the great baleen and toothed whales of the world's oceans - sustainable use or preservation, and *how* that approach should be implemented. It is a problem of both substance and process'.⁸⁵⁴ In the opinion of the present writer, however, the 'contest' is about far more than the management of whales - it is about management of all living natural resources.

3.4.7 *Pareto optimality?*

According to some, it is essential that the disputes within the IWC be resolved. Former Secretary to the IWC, Gambell, for instance, writes that '[t]he original Convention was drafted⁸⁵⁵ to control the catching operations of a particular fishery, which throughout its long history had overexploited the resource on which it was dependent'; but, he suggests, the ICRW is 'now being interpreted as an instrument to implement a new environmental conservation ethic, but this change of emphasis is not wholly agreed to or accepted by some of the communities most affected by this change in orientation'. He concludes that '[t]his contentious and potentially divisive issue must be resolved soon or the IWC will have forfeited its position as the global authority for the management of whales and whaling'; and explains that '[g]iven the IWC's expertise and its long-term experience in addressing these issues, this would be regrettable'.⁸⁵⁶

It has also been argued, on the other hand, that in fact the present situation is already as close to being ideal as it is likely ever to be. Victor, for instance, writes that '[t]he need to promote international law and governance might [] be a compelling reason to reform the IWC'.⁸⁵⁷ ... [But] building a new agreement will result in either deadlock (and thus no agreement) or extensive reliance on US power (and thus a coerced agreement). Neither is good for the rule of law'. He then argues that the IWC does have an important role to play; in that the 'pragmatic needs of governance require that some legal instrument exist to protect against the resumption of unsustainable practices by the few remaining commercial whalers and to manage aboriginal whaling to the extent possible'. He describes the ICRW as being 'still needed'; and serving 'a useful function in international law - as a backstop to provide political assurance' that the 'whale problem' is generally under control. The alternatives, he says, would be no better for the rule of law; as '[r]eforming the legal regime to advance the public good of international law is a mission for which political pressure is weak and thus bound to fail'⁸⁵⁸ and the 'feasible alternatives would be worse than maintaining the status quo'. Ultimately, his assessment is that the 'lack of a tight link between the preferences of the IWC's voting majority and actual behavior allows most parties to satisfy their interests'; although the 'result is a messy process - where *de facto* rules and practices are built up through unilateral interpretations and careful strategic action rather than strict adherence to IWC decisions and

⁸⁵³ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3, at 3.

⁸⁵⁴ *Ibid* at 4.

⁸⁵⁵ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 85.

⁸⁵⁶ *Ibid* at 85.

⁸⁵⁷ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 303-04.

⁸⁵⁸ *Ibid* at 304.

the rule of law'. However, he feels that the 'present messy outcome' might even be what is known as 'Pareto optimal' - a situation where 'no party could do better without harming the others'.⁸⁵⁹

Questioned as to his view on this, Herman Oosthuizen felt that it was 'the crux of the state of the IWC at the moment', with some countries apparently being content with the current situation; but that on the other hand perceptions could be deceiving with some countries seeming to be actively involved in the management and/or conservation⁸⁶⁰ of whales, while at the same time most likely undermining the proper functioning of the IWC. He pointed out that more whales are being killed now under scientific whaling than would have been the case if there were commercial whaling; and argued that Japan is 'loading their dice' by proposing the scientific take of humpback and fin whales, and by increasing the number of minke whales taken. The question, he asked, is why - with one possibility being that it is to start negotiations from a strong position; and another that it might be to stretch the credibility of the IWC to the point where it 'snaps'. South Africa, he said, is not currently getting 'what we want' as the IWC is so involved with the future of the IWC that issues such as whale-watching, ship strikes and bycatch of whales are not being addressed. He added that there are many other countries which feel the same way South Africa does. There are, he said, a few countries 'in the middle bloc' that have tried 'very hard to bridge the gap' in the past; such as Sweden, the Netherlands, and Ireland. He concluded therefore that there are countries 'in the middle which're trying to bridge the gap ... but that they have no or very little support from the countries on both sides of the coin, both pro- and anti-whaling'. He added, however, that currently there are movements in the positions of many countries, that the current position at the IWC is very fluid, and that it is difficult to predict the route that negotiations at the IWC (if they happen) will follow'.⁸⁶¹

According to Friedheim, however, 'neither side is willing to accept as a permanent outcome the current regime'.⁸⁶² He bases this judgment on the argument that the 'preservationists are not willing to concede what the whalers now "have", and the whalers insist upon having more than what they have been allotted under the present regime'. Both, he says, 'push toward improving their situations and force us to consider, if they continue, whether the [IWC] will remain a viable international resource management organization'.⁸⁶³ Friedheim then suggests that, increasingly, an 'important part of the IWC's annual business involves passing resolutions concerning all aspects of whales and whaling in order to provide guidance for (if one wishes to be polite) or to put pressure on (not polite) the parties to conform their behaviour to the resolution's demands'. Such resolutions, he says, 'have no formal standing in international law, and in theory they are not binding upon the parties. But those who endorse

⁸⁵⁹ *Ibid* at 304.

⁸⁶⁰ Apparently here meaning 'protection'.

⁸⁶¹ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens. This comment was, however, revised by Oosthuizen in an email to me of 1 December 2008, and now largely reflects his view as influenced by the negotiation efforts of 2007 and 2008. See [3.4.2](#) and [3.4.3](#) on 2008 moves; and [17.1](#) on efforts to change.

⁸⁶² R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* Seattle: University of Washington Press, 2001 311 at 311-12. The current regime, says Friedheim, 'includes (1) a formal ban on whaling through a moratorium and Southern Ocean sanctuary, (2) an informal and grudging tolerance of Japanese scientific whaling and Norwegian regional commercial whaling, (3) seemingly equally grudging acceptance of indigenous whaling, and (4) no provision for whaling rights for artisanal claimants'. *Ibid* at 311-12.

⁸⁶³ *Ibid* at 311-12.

such resolutions hope they will become part of “soft law”, purportedly reflecting commonly accepted norms, and thus will be obeyed’.⁸⁶⁴

Friedheim, I think, gives a strange interpretation of ‘soft’ law. Rather, the hope of the ‘endorsers’ must be that the resolutions will eventually harden into ‘hard’ law - and then be binding as customary law. ‘Soft’ law has very little status.

As the present writer has suggested above,⁸⁶⁵ though, Resolutions do appear to have a certain status. When draft Resolutions are put forward, there seems usually to be some urgency attached to them with their sponsors insisting sometimes that the drafts be voted upon even when it is clear that they will be rejected. Once adopted, the Resolutions do stand and are referred to at future Meetings. The St Kitts and Nevis Declaration of IWC 58, for instance, was not set aside or replaced at IWC 59 - even though the ‘side’ that had ‘lost’ the vote on the Declaration had a voting majority the following year. Another example is the way in which the Japanese delegations attach importance to the various Resolutions on ‘alleviating the suffering of their coastal people’ that have been passed over the years.

Some criticism of members of the IWC can be extremely harsh. Lapointe suggests that ‘[u]nfortunately, the situation with the IWC appears to be unchanged, unchallenged, and of no concern to many of its commissioners’. Membership, he cautions, of an international organization ‘is a serious matter, requiring adherence to the legal provisions and treaty assurances that there will be no encroachment on the sovereign rights of other members’. Even more caustically, he suggests that ‘[t]here are numerous indications that certain nations (Mexico, New Zealand, the UK, and the US, for instance) have simply forgotten the full meaning of becoming a member of an international forum’; and, as an example, he explains that ‘[a]ny honest observer cannot have the smallest doubt that the IWC’s decision to establish a Southern Ocean (Antarctic) Sanctuary was made in blatant disregard of the legal provisions of the ICRW’.⁸⁶⁶

Jacobson argues that ‘current events concerning the fortunes of whales and whalers present us with a crucial international law question of some difficulty. Summed up, that question is whether it is legally possible to use the present IWC and its convention to protect and preserve all whales from whalers without sacrificing even greater values. To me, alas, the answer is no’.⁸⁶⁷ Jacobson, this writer thinks, goes too far - suggesting that the IWC be ignored, see earlier,⁸⁶⁸ and now expressing dire pessimism over the IWC’s future.

Burke is, if anything, even more pessimistic than Jacobson; suggesting that ‘[a]t least one point is clear, if anything can be where whaling is concerned’, which is that the IWC ‘has no direct role to play, even if the aim of interested states is to modify the ICRW itself’. This is because, ‘[o]ther than changing the Schedule, where the commission makes the decision, the ICRW has no provision for amendment at all, let alone giving some role to the commission’;

⁸⁶⁴ *Ibid* at 206.

⁸⁶⁵ See 3.3.32.

⁸⁶⁶ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 56.

⁸⁶⁷ J L Jacobson ‘Whales, the IWC, and the Rule of Law’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 80.

⁸⁶⁸ See 3.2.18, and (n 415), (n 416), (n 417), (n 419), (n 420). See also (n 878).

and ‘[h]ence the commission itself has no authority to change the basic treaty’ and instead the ‘states parties (and any other state participating) must negotiate a new agreement’. He concludes that there would be formidable difficulties standing in the way of achieving this; especially because of ‘the great differences between those who would prohibit all whaling and those who would allow a regulated harvest of sufficiently abundant species and stocks, of which there are several’.⁸⁶⁹

Andresen, however, writes that ‘there is essentially nothing wrong with the present institutional setup of the regime. On the contrary, it is quite good’.⁸⁷⁰ ‘From a sustainability perspective’, he continues, ‘it is worse to *overutilize* resources, as was done in the 1950s, than to *underutilize* them, as in the 1990s’; and suggests that ‘[i]n this sense, there has certainly been progress in the management of whales from the 1950s to the 1990s’.⁸⁷¹ Members, he says, have the right to object to any amendment; although the rules were ‘no doubt designed to serve the interests of the Antarctic whaling nations ... from a comparative perspective, the decision-making rules of the IWC are by no means particularly biased toward protecting the interests of the main harvesting nations’.⁸⁷² This tallies with Birnie, see earlier,⁸⁷³ who argued that the ICRW has inherent flexibility. Andresen’s assessment tallies also with Victor’s suggestion of Pareto optimality.⁸⁷⁴

Kleinschmidt, a former Vice-Chair, argued to the present writer that the IWC ‘tries to modernise itself, it tries to reinvent itself’; but that he sees that merely as ‘an attempt to restate its 1946 mandate’ and that the IWC ‘has all the appearance of a tired organisation’. He explained what he meant: ‘tired in the sense that ... it is totally ramified in the technical debate around the moratorium-or-not issue’; it is, he said, ‘all again words, and the outsider wouldn’t really easily understand ... it takes quite a smart journalist to understand what has been said ...’; with ‘the actual debate that needs to be had ... never surfacing there’.⁸⁷⁵

Stone contends that ‘it can fairly be said that none of the diplomats who met in Washington in 1946 likely intended (or even contemplated) a zero quota on abundant stocks, much less a full moratorium in the Southern Ocean’. He then asks whether this means that the commission has therefore ‘exceeded its mandate (acted *ultra vires* in the legal vernacular)?’ and concludes that this is not necessarily so.⁸⁷⁶ Some, he says, ‘maintain that the focus has swung from securing the profits of whalers to protecting the lives of individual whales’; and he asks ‘[a]t what point does a deflection become a betrayal?’. He then explains that ‘in conventional legal terms, the question might be asked whether the current zero quota (and the Southern Ocean sanctuary) are ‘so *ultra vires* - so far beyond the commission’s powers as authorized in the 1946

⁸⁶⁹ W T Burke ‘A New Whaling Agreement and International Law’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 51-52.

⁸⁷⁰ S Andresen ‘The Whaling Regime: “Good” Institutions but “Bad” politics?’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 235.

⁸⁷¹ *Ibid* at 237.

⁸⁷² *Ibid* at 238-39.

⁸⁷³ See (n 144), (n 151), (n 223), (n 408), (n 424) and (n 813).

⁸⁷⁴ See 3.4.7.

⁸⁷⁵ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. Also, email from H Kleinschmidt to E Couzens; 10 October 2008.

⁸⁷⁶ C D Stone ‘Summing Up: Whaling and Its Critics’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 270-71.

agreement - that it [the shift in focus] cannot be accomplished legitimately without express authorization through amendments to the [ICRW] by the convention's parties?'.⁸⁷⁷

This provokes an interesting idea, that perhaps it is not *just* whales that are covered, but *all* natural resources - *represented* by the whales. Would this be too much of a distortion of the original language and intention? The trouble is, the present writer can make this point, but then becomes like Jacobson - suggesting something that nobody on the other side of the debate is going to accept.⁸⁷⁸

Burke argues that '[a] significant difficulty that might confront any negotiations for a new whaling regime is to overcome the mistrust generated by the too frequent practice by IWC members of implementing the ICRW as if the terms originally adopted didn't really matter.'⁸⁷⁹ It is not, he says, 'defective drafting or indeterminate terminology that led to the distortion in implementation of the ICRW'; the treaty itself 'is straightforward in expressing the purpose of conserving whales in order that species and stocks can continue to be harvested' and '[n]othing in the ICRW is so ambiguous that it can reasonably be made to yield an interpretation precisely the reverse of the original purpose'. His conclusion, however, is that '[u]nfortunately, however, no drafting legerdemain can successfully prevent the regime destruction that results from the blindness of ideological conviction and moral superiority'; and that 'no matter how skilled drafting may be, it is easily conceivable that differences of interpretation will arise without any origin in bad faith'.⁸⁸⁰

The question might be asked: does the argument then become one as to whether subsequent practice can change the original purpose or not?

According to Jacobson, the Vienna Convention on the Law of Treaties, 'which does not directly apply to the ICRW but which has been said to generally reflect customary international law', allows treaty parties to raise, *inter alia*, 'changed circumstances and material breach as grounds for termination of a treaty'. On the other hand, he argues, 'it might be charged by whaling state parties that other parties ... have committed material breaches of the ICRW's limited grant of authority to the IWC'.⁸⁸¹ According to the Vienna Convention', Jacobson continues, 'if a treaty, during its tenure, were to come into conflict with a newly emerged peremptory norm of international law (*jus cogens*), the treaty would terminate'. Thus, he argues, should 'a peremptory norm forbidding commercial whaling emerge', the ICRW 'would terminate because its clear purpose is to allow commercial whaling, and it would be replaced by the new peremptory norm'.⁸⁸² 'In my view', concludes Jacobson, 'that norm is now in the emerging stage but has not yet arrived'.⁸⁸³ Quite clearly, Jacobson is correct and it has not. Whether it ever will is a matter of conjecture, but it is not the direction in which the majority of the world's States appear to be moving.

⁸⁷⁷ *Ibid* at 270-71.

⁸⁷⁸ See 3.2.18, and (n 415), (n 416), (n 417), (n 419), (n 420). See also (n 868) and (n 2224).

⁸⁷⁹ W T Burke 'A New Whaling Agreement and International Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 59-60.

⁸⁸⁰ *Ibid* at 61.

⁸⁸¹ J L Jacobson 'Whales, the IWC, and the Rule of Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 80 at 83-84.

⁸⁸² *Ibid* at 84-85.

⁸⁸³ *Ibid* at 97-99.

On the issue of whether members are generally getting what they want; Freeman contends that '[i]t would be naïve not to recognize that for the majority of participants in IWC discussions, the current nonresolution of the whaling problem is the desired outcome'.⁸⁸⁴ This may not be the worst thing, however. Victor has argued, that '[n]ot only does the regime not need massive reform, it may be Pareto optimal - the interests of most of its participants could not be better satisfied by any feasible alternative to the status quo'.⁸⁸⁵ According to Vogler, '... 'Pareto optimality' ... may be explained by considering a change in the distribution of resources resulting in a situation where some people are better off but without at the same time making anyone worse off. Such a situation is 'Pareto optimal'. This is not, he says, 'the same as fair or equal shares to a common resource and would often be politically unacceptable because it does not deal with the relative deprivation felt by those whose welfare is not improved. Such is the stuff of politics'.⁸⁸⁶

The argument is supported by Ishii and Okubo, who posit that Japan might not be serious about trying to resume commercial whaling - they argue that it 'is logically possible for Japan to obscure its real diplomatic objective by claiming the opposite in the IWC negotiations'. They then suggest that the 'primary objective' of Japanese whaling diplomacy (led by the Fisheries Agency of the Ministry of Agriculture, Fisheries and Forestry; together with the Institute for Cetacean Research and the Japanese Whaling Association) might be the continuation of scientific whaling. They put this very strongly, arguing that the whaling camp does not want the moratorium on commercial whaling to be lifted; and that it is 'only pretending that it is devoted to resuming commercial whaling because it prefers the *status quo*'.⁸⁸⁷

Continuing with Ishii and Okubo, they argue that Japan has not pursued any of the obvious strategies that might enable it to resume commercial whaling. Firstly, Japan has done little to create a favourable atmosphere for negotiation within the IWC;⁸⁸⁸ in fact, they point out, Japan appears intentionally to have created an acrimonious atmosphere.⁸⁸⁹ Secondly, Japan has done little to respect the scientific community and achieve respect for Japan's scientific credibility; instead, Japan has undertaken much research irrelevant to management advice, and has in fact done much to undermine the work of the Scientific Committee (and by denouncing as biased scientists who have opposed the Japanese line).⁸⁹⁰ Thirdly, Japan has done little apparently in earnest to negotiate with the anti-whaling nations. Ishii and Okubo give several examples of this apparent disinterest; such as the retreat from their apparent rapprochement with the US over bowhead whaling quotas in 2002. The authors point out that Japan did not foster links with the US after 2002, despite the US having - at the intersessional meeting of the IWC - supported Japan's efforts to obtain interim relief allocations of minke whales for their four coastal whaling communities. The US has not since 2003, when Japan changed tack on the

⁸⁸⁴ M M R Freeman 'Is Money the Root of the Problem? Cultural Conflicts in the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 123 at 125.

⁸⁸⁵ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 293.

⁸⁸⁶ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 19, fn 6.

⁸⁸⁷ A Ishii & A Okubo 'An Alternative Explanation of Japan's Whaling Diplomacy in the Post-Moratorium Era' (2007) 10:1 *Journal of International Wildlife Law & Policy* 55 at 56.

⁸⁸⁸ *Ibid* at 75-76.

⁸⁸⁹ *Ibid* at 79.

⁸⁹⁰ *Ibid* at 79-81.

interim quotas, supported the quotas applied for.⁸⁹¹ Fourthly, the authors suggest that Japan has done nothing to create a strategy, a support network, that would enable the country to leave the IWC - despite its numerous threats to do so.⁸⁹²

Ishii and Okubo outline two possible reasons for Japan acting as they suggest it is doing. Firstly, they propose that the explanation may be rooted in domestic politics, with the Fisheries Agency of the Ministry of Agriculture, Fisheries and Forestry being desperate not to give up the subsidies and commissions that accompany research whaling.⁸⁹³ Secondly, they suggest that Japan's stance on whaling might give the country domestic (and even international) credibility by showing that it can 'stand up to' the United States - even though since 1945 Japan has very seldom been able to deny the US anything.⁸⁹⁴

While the present writer enjoyed Ishii and Okubo's article, and agrees with the logic of its argument, it appears to me that they simply do not take their argument far enough. There remains at least one more possible - and not implausible - explanation for Japan's being 'content' with the status quo; which is the possibility that the entire whaling issue is simply an extremely large 'red herring' which serves to distract attention from the real damage which Japan is doing - in its short-term interest - to other areas of the global environment, fisheries in particular.⁸⁹⁵ In other words, while the world focuses its attention on whaling - with its ongoing feints, lunges and parries - other environmentally damaging use of natural resources is kept largely below the radar.

One problem with the contention of Pareto optimality, though, is simply that none of the parties *appear to be* content with the way things presently stand. Victor points out that '[a]lthough the present regime serves the interests of most participants, no party achieves all that it wants'; and that '[s]ome are even seriously injured as fundamental principles of justice and human rights are violated'.⁸⁹⁶

When the present writer put this to Paul Watson, Watson said that Sea Shepherd was 'not happy about it'; and that what they would like to see was Japan dropping out of the IWC, so that they then would be outcasts and Sea Shepherd could be more aggressive against them - 'right now', he said, 'we're sort of bound by the laws that we have to adhere to'. He then explained that he thought that what 'the IWC really should do is take a firm stand on what's legal and what isn't legal'. He then asked how the IWC could 'declare a sanctuary and then allow the killing of whales'; before asserting that 'as long as it's a sanctuary we're gonna be down there intervening against them ... and as far as Norway and Iceland ... well, Iceland are also targeting endangered species ... whaling has no place in the 21st Century ... these animals are not only affected by global warming and pollution and fishing'.⁸⁹⁷

⁸⁹¹ *Ibid* at 82-84. See 10 generally; and see 3.3.10.

⁸⁹² *Ibid* at 84.

⁸⁹³ *Ibid* at 84-85.

⁸⁹⁴ *Ibid* at 85.

⁸⁹⁵ See 11.3.

⁸⁹⁶ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 299.

⁸⁹⁷ *Personal communication* Interview with Paul Watson, Anchorage, 28 May 2007; E Couzens.

It may also be that states are less content with the current position, than they are scared to change anything in case they lose thereby. Friedheim argues that ‘the strategy and tactics used by both pro- and anti-whaling states, state coalitions, and nongovernmental organizations has produced stalemate, and unless some of the major players break from their long-held positions, stalemate will be the best that can be hoped for in the foreseeable future’. This is not, per Friedheim, ‘to say that the major actors are happy with the present stalemate, but they fear they will be worse off if they shift their position or take another approach to the problem’.⁸⁹⁸

3.4.8 *The implications in international law*

It has been suggested that even if one side is *not* dominating within the IWC; the perception that this is happening can itself be damaging for international law. Per Stone, ‘whether or not the commission is legally *ultra vires*, one must be troubled by the unmistakable *appearance* that the IWC has been kidnapped, and by what this presages for international environmental laws and institutions. ... what has happened within the IWC may chill the development of international environmental accords in various other areas’.⁸⁹⁹ ‘At its worst’, he continues, ‘the “moral” of the IWC’s straying is this: any nation that signs a global environmental or resource convention may find itself in a (frankly) “stuffed” regime that tosses aside its original premises and pays little heed to its own scientific advisors. That is not a lesson that we should want broadcast to a global community already wary - certainly the United States is - of extending international commitments’.⁹⁰⁰ Certainly it is true that the US is not always keen on international environmental treaties - *vide* its approach to the Framework Convention on Climate Change, the Kyoto Protocol thereto, and the Convention on Biological Diversity.⁹⁰¹ In fairness to the US, it might be, though, that this can be explained at least partly by the fact that the US takes essentially a ‘monist’ approach to the incorporation of international law into national law - when the US binds itself to an international agreement, the provisions of the agreement are immediately enforceable in the US national courts and this makes the US understandably cautious about ratifying MEAs.⁹⁰²

Victor writes that ‘[e]ven principles of justice are not completely ill-served by the current regime and might also fare worse under a reformed IWC’; and ‘[a]chieving the ultimate objective of stopping whaling would require applying more power - sanctions and boycotts - that almost surely would trample rights further’.⁹⁰³ Probably, he continues, ‘it is worth reconciling environmental and trade conflicts on a more important issue for animal rights

⁸⁹⁸ R L Friedheim ‘Negotiating in the IWC Environment’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 200-201.

⁸⁹⁹ C D Stone ‘Summing Up: Whaling and Its Critics’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 273.

⁹⁰⁰ *Ibid* at 273.

⁹⁰¹ See http://unfccc.int/essential_background/convention/items/2627.php; http://unfccc.int/kyoto_protocol/items/2830.php; and <http://www.cbd.int/>.

⁹⁰² See, for instance, R Layton ‘When and how can domestic judges and lawyers use international law in Dualist systems’ *ILS Judges Training Materials* http://training.itcilo.org/ils/ILS_Judges/training_materials/english/Dualist_Systems_Layton.pdf (undated) at 5, fn’s 17 and 18; referring to J H Jackson ‘Status of Treaties in Domestic Legal Systems: A Policy Analysis’ (April 1992) 86:2 *American Journal of International Law* 310-340.

⁹⁰³ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 305.

advocates and environmentalists (and the animals themselves), such as the protection of truly endangered species'.⁹⁰⁴ This is an argument to be considered - but, given that whales and elephants are symbols, how could killing them with global approval persuade persons to conserve generally? Only by fully embracing the Convention on Biological Diversity, perhaps - as well as educating more people than it is possible to imagine reaching.

Victor argues further that '[t]he risk of missteps is greatest in the whaling states, especially Japan, which incorrectly thinks that it will benefit from the formal resumption of commercial whaling. It appears that Japan still does not know how the game should be played'.⁹⁰⁵ As an example of this, Victor refers to 'Japan's decision in 2000 to expand its scientific whaling to include charismatic Moby-Dick sperm whales;' and suggests that this decision 'earned scorn across the West and forced the US government to renew threats of sanctions.'⁹⁰⁶ However, this decision - to take ten sperm whales - must be seen as a slap of the glove across the face. To describe the Japanese as 'not knowing how to play the game' is arguably quite bizarre. Probably Japan is quite aware of how far it can push the US before sanctions will be instituted.

Japan's provocative escalation of whaling is almost certainly tactical, rather than to satisfy needs.⁹⁰⁷ Iino and Goodman suggest that 'Japan's policy towards the IWC is [] best understood as a strategic effort to encourage the IWC to function in accordance with the objectives and provisions of the ICRW as well as relevant principles regarding conservation and management of marine living resources, such as sustainable use based on scientific evidence'. In response, the writers suggest, 'to recent scientific evidence concerning the interaction between cetaceans and fisheries, Japan is also encouraging the IWC to adopt an ecosystem approach to the management of marine resources'.⁹⁰⁸ In other words, whaling is just part of the whole - Japan is after far more than a few more whales on restaurant plates.

Concurring at least partially with this, Friedheim writes that '[t]here is [] pressure from the flank'.⁹⁰⁹ ... The restoration of limited trade in elephant products is one reason I would not include a strict trade ban in an IWC reform. Rather, it seems to make sense that if the limited elephant product regime is successful, it should provide a set of practices that the IWC can emulate. In any case, I expect that what has been happening in CITES will reverberate in the IWC'.⁹¹⁰ This is of course the sort of linkage which is important for the arguments being made in the present thesis.

⁹⁰⁴ *Ibid* at 305-06.

⁹⁰⁵ See 3.4.5.

⁹⁰⁶ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 307.

⁹⁰⁷ See (n 2060) and (n 2274).

⁹⁰⁸ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 6.

⁹⁰⁹ R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 313. 'Some states', explains Friedheim, 'are pushing in the conference of the parties of CITES to get minke whales reclassified from Appendix I (particularly strict trade regulation and authorized only in exceptional circumstances) to Appendix II (strict trade regulation). The Norwegian proposal for reclassification gained a majority (fifty-seven yea, fifty-one nay, six abstentions), but not a requisite majority. Moreover, limited trade of products of the other charismatic megafauna - the elephant - was restored for those states that had a good elephant conservation record'. *Ibid* at 313.

⁹¹⁰ *Ibid* at 313.

Along the same lines, Iino and Goodman argue that '[t]he credibility of the IWC as a resource management organization has been recently challenged by other international organizations including the World Conservation Union (IUCN) and the Secretary General of [CITES]'. They suggest that '[i]n its opening statements⁹¹¹ to the annual meetings of the IWC, the IUCN has urged the IWC to complete the Revised Management Scheme (RMS) and the Secretary General for CITES stated in his letter to the Chairman of the IWC that "the IWC should soon make important progress towards the adoption of a Revised Management Scheme" ...'.⁹¹² The linkage between the two treaties is surely clear - both in the explicit steps taken by States parties and the treaties' secretariats to link them, and in the subject matter with which each deals and in the concerns they must share.

3.4.9 Conclusion

What happened in the IWC is that the tactic used by the anti-whaling Members, of bringing in new Members to support their view and eventually to adopt the 'moratorium', was then adopted by the pro-whaling Members - and the ICRW saw a period of rapid growth, with many States joining despite having no discernible interest in whaling. This 'numbers race' quickly led to deadlock. After various attempts by the pro-whaling States to overturn the 'moratorium' proved fruitless; this impasse then led to efforts by these States to broaden the ambit of the debate and to involve CITES. A deliberate tactic was apparently followed, by certain pro-whaling Parties, of trying to undermine the ICRW through downlisting motions at CITES. The ensuing years saw varied efforts being made to re-open commercial whaling; with each effort being stymied by the pro-whaling Members. The relationship between the ICRW and CITES became particularly dangerous ground as the years went by and as CITES was used by the pro-whaling States to bring increased pressure to bear on the ICRW. Other tactics used, and difficult relationships which arose, included the issue of small-type coastal whaling and aboriginal whaling; and efforts to transform the nature of the ICRW. Many efforts by well-meaning States to bring the warring Parties together failed. Political manoeuvring came to dominate the plenary sessions, and to a lesser extent the scientific sessions, of the IWC.

At the time of writing this thesis, mid-2008, there seems to be little *immediate* prospect of bringing the impasse to an end.⁹¹³ IWC Members remain apparently locked into one camp or the other, with little room for middle ground. Parties who try to sit on the fence risk alienating both friends and enemies. Most Parties continue to complain and to express discontent with the situation. There is also a possibility, however, that many Parties might in fact be relatively content with the *status quo*.

⁹¹¹ Fn 13: IWC Doc. IWC/52/OS/IUCN, IWC/51/OS/IUCN and IWC/50/OS/IUCN. Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 6.

⁹¹² Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 6. The letter was written by the CITES Secretary General, Willem Wijnstekers, on 4 July 2000. See, for instance, <http://www.cites.org/eng/cop/13/doc/E13-12-2.pdf>.

⁹¹³ See 17.1.

4 The second old watchdog: CITES

4.1 The creation of CITES

4.1.1 *The birth of CITES*

CITES is an ‘old-style’ Convention which does not make provision for ongoing monitoring (although it has a permanent secretariat charged with ensuring that it is operating successfully, the role of this Secretariat is not intended to be that of monitor)⁹¹⁴ and does not make any provision for financial support of countries which have difficulty in meeting their treaty obligations due to lack of funds, or which are forced to act under the treaty at undue financial cost to themselves relative to other parties.⁹¹⁵ It was signed into existence at Washington in 1973, as one of a number of Conventions surrounding the 1972 United Nations Conference on the Human Environment (UNHCE) in Stockholm. CITES regulates international trade and has only extremely limited (and largely informal) jurisdiction to look at situations inside states and to regulate their internal actions.

On the history of CITES, it has been suggested that it may have had its early origins in the United States - in the ‘Lacey Act of 25 May 1900, which prohibited interstate commerce in illegally taken wildlife, [and which was] extended in 1935 to wildlife imported from abroad’.⁹¹⁶ Of course, it is just as likely that CITES’s origins are to be found in the 1900 London Convention (even though this never came into force) and the 1902 Paris Convention - and the ideas of categorisation of species which flowed from these two early conventions. In truth, the origins of CITES must be seen as lying in many places - and indeed in the *zeitgeist* of increased environmental awareness and concern in the late 1960s and early 1970s.

In the United States, ‘the Endangered Species Conservation Act of 1969 authorized the US Department of the Interior to promulgate a list of wildlife “threatened with worldwide extinction”, imports of which were prohibited except for scientific or breeding purposes’.⁹¹⁷ ‘At the same time’, suggests Sand, ‘the US government was directed to encourage the enactment of similar laws by other countries and to “seek the convening of an international ministerial meeting” to conclude “a binding international convention on the conservation of endangered species”...’.⁹¹⁸ This initiative, Sand continues, ‘coincided with preparations for the UN Conference on the Human Environment [of 1972]’;⁹¹⁹ as well as with research within the IUCN, which had in 1963, at its General Assembly in Nairobi, called for an ‘international convention on regulation of export, transit and import of rare or threatened wildlife species or their skins and trophies’. The IUCN suggestions had been based on the idea of controlling (or

⁹¹⁴ A permanent Secretariat located in Geneva (originally in Lausanne), Switzerland oversees the application of the CITES system, but day-to-day operation is a matter for the national authorities of the parties.

⁹¹⁵ This is a point of contention for the southern African elephant range states, who had to forego the financial proceeds of the sale of elephant products after the Appendix I listing of the elephant in 1989. See (n 1109), (n 1137), (n 1211) and (n 1643).

⁹¹⁶ P H Sand ‘Commodity or Taboo? International Regulation of Trade in Endangered Species?’ *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 20.

⁹¹⁷ *Ibid* 19 at 20.

⁹¹⁸ *Ibid* 19 at 20.

⁹¹⁹ The UNCHE; or Stockholm Convention.

banning) the wildlife trade ‘on the basis of global lists of threatened species to be drawn up and updated (along Red Data Book lines) upon advice by an international expert committee’. Opposition to this approach, according to Sand, came from developing countries, ‘led by Kenya, insisting on the right of each range State to determine its own list of tradable species’.⁹²⁰

Reeve agrees with Sand as to the origins of CITES in the 1963 resolution;⁹²¹ and records that ‘a 1972 draft text was put forward by the United States, based on a consolidation of [an] IUCN text and a counter-proposal from Kenya, and that this document served as the working document for the Conference [of 80 plenipotentiaries, held at the Pentagon in Washington DC from 12 February to 3 March 1973]’.⁹²²

It is interesting to note that Kenya played an important role in CITES even at this early stage. Of course, at about the same time Kenya became the first developing country to house a significant United Nations programme - the United Nations Environment Programme (UNEP), which remains to this day the only United Nations programme housed in the developing world. As well as being interesting, Kenya’s role and the counter-proposal are extremely ironic in light of Kenya’s current attitude to the Southern African range states’ present views - in respect of elephant management. If Kenya was then at least partly responsible for the treaty being a trade treaty as well as a conservation treaty; it is now one of the world’s leading protagonists of a preservationist approach. With hindsight, this shows something of how country positions can change over time. Today, as will become apparent, Kenya is not at all in favour of the principle of range states making their own decisions on trade.

It is significant that Kenya played this early role also because Kenya remains today an important voice in the conservation debate. Kenya is an interesting state, too, because it is today consistent on whales and elephants - arguing for the protection, rather than use, of both. It is important, though, to recognise that even Kenya has changed its stance over time and might therefore do so again in the future.⁹²³

Nevertheless, per Sand again, both approaches were ultimately accommodated in a 1972 US draft that served as working document for the conference of 80 potential parties in 1973. The outcome of the Washington Conference was CITES: ‘a convention with 25 articles and four appendices - hailed by conservationists as “Magna Carta for Wildlife” - that was both a ‘conservation *and* trade instrument’, to protect wild fauna and flora both for humankind (‘present and future generations’) *and* as national heritage (‘of peoples and States’).⁹²⁴

⁹²⁰ P H Sand ‘Commodity or Taboo? International Regulation of Trade in Endangered Species?’ *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 20. According to Sand, ‘... that view found support in the United States (which was also a commercial exporter for products such as bobcat furs and alligator hides, and which found the Kenyan approach compatible with its Lacey Act)’. *Ibid* 19 at 20.

⁹²¹ Reeve tells us that ‘[t]he origin of CITES lies in a 1963 resolution of the General Assembly of the International Union for Conservation of Nature and Natural Resources (IUCN), now the World Conservation Union, calling for ‘an international convention on regulation of export, transit and import of rare or threatened wildlife species or their skins and trophies’. R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 27.

⁹²² *Ibid* at 28.

⁹²³ See 9.3.

⁹²⁴ P H Sand ‘Commodity or Taboo? International Regulation of Trade in Endangered Species?’ *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 20. The initial IUCN drafts, according to Reeve, had ‘been based on control of wildlife trade through global lists of threatened species, to be drawn up and updated on the advice of an international expert committee. But the counter-proposal by Kenya, which led developing country opposition to such an approach, insisted on the right of each range state to determine its own list of tradable species’. R

The CITES Secretariat is provided by UNEP; and it has been said that '[t]he establishment of a professional full-time Secretariat was unusual in an international environmental instrument at the time when CITES was drafted'.⁹²⁵ The CITES Secretariat has, in fact, taken an active role in the operation of the treaty. Certainly, from amongst the cluster of international environmental conventions of the early 1970s, CITES remains the most visible. The Ramsar Convention⁹²⁶ and the World Heritage Convention⁹²⁷ are both active conventions, but not to the same extent - although by their nature they do operate, of course, in more passive ways.

4.1.2 *The administration of CITES*

According to the CITES Secretariat itself, CITES is a treaty for preventing over-exploitation of wild fauna and flora for international trade.⁹²⁸ It is interesting to note that this description would appear to focus more on protection of species than on protection of the goal of trade.

Supported by national legislation, according to the CITES Secretariat, trade in species listed in the three CITES Appendices must conform to CITES requirements and provisions outlined in the text of the Convention. Ongoing implementation of CITES is steered by Resolutions of the Conference of the Parties. Permits and certificates, supposedly in standardised format, are issued by competent authorities; as long as certain conditions are met in the exporting country or in both the exporting and importing countries. Required conditions vary according to the Appendix in which particular species are listed; and these focus on the purpose of trade, the impact on conservation (which is determined by a scientific authority), legal acquisition and, where relevant, humane treatment concerns. Permits and certificates are endorsed (usually by Customs) upon exit, and presented (usually to Customs) on entry. Data collected from permits and certificates contributes to a body of information that allows Parties to follow international trade trends; and supposedly then to adapt national and international conservation and trade policies as necessary'.⁹²⁹

CITES does appear on the whole to have been a successful treaty. Harland calls it 'the most active and visible instrument of international environmental law in force'.⁹³⁰ And Hepworth, writing in 1997, argues that 'most parties believe that CITES works. It has direct, practical effects in the real world and, indeed, some 136 nations have decided that it is sufficiently important to merit their participation'.⁹³¹ Lyster describes CITES as 'perhaps the most successful of all international treaties concerned with the conservation of wildlife'. He argues that the success of the treaty is explained 'primarily by its basic principles, which most States

Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 28.

⁹²⁵ *Ibid* at 43.

⁹²⁶ The Convention on Wetlands of International Importance, (deleted: 'especially as Waterfowl Habitat'), adopted on 2 February 1971, Ramsar, Iran; see <http://www.ramsar.org>.

⁹²⁷ The Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO (the United Nations Educational Scientific and Cultural Organisation) on 16 November 1972; see <http://whc.unesco.org>.

⁹²⁸ 'CITES explained in one paragraph' *CITES World: Official Newsletter of the Parties* Issue Nr 17 - July 2006

<http://www.cites.org/eng/news/world/17.pdf> (accessed 27 October 2006) at 16.

⁹²⁹ *Ibid* at 16.

⁹³⁰ D Harland *Killing Game: International Law and the African Elephant* (1994) at 12.

⁹³¹ R Hepworth 'The Independent Review of CITES' (Conference Paper - University of Nottingham Conference - 1997). As at December 2008, there were 173 Parties; see <http://www.cites.org/eng/disc/parties/index.shtml>.

have proved willing to accept, and by the way it operates, which ensures that on the whole it is better enforced than many other treaties'.⁹³²

What other contenders might there be for title of 'most active and visible instrument'? Perhaps in very recent times the Kyoto Protocol (of 1997) to the Framework Convention on Climate Change (of 1992); and perhaps the ICRW, which meets annually and certainly has great visibility. It is interesting to speculate as to why CITES has worked better than has the ICRW. Perhaps chance has played a role, in its having so much greater a membership. Perhaps the timing, being some twenty-five years later, led to the greater membership and to greater commitment by members. Perhaps it is that the ICRW remains basically a single-issue treaty, in a world where greater understanding of complexity and interrelationships (in nature, and in man's relationships with nature) have come to dominate thinking. Both treaties have a dual purpose (trade and protection) but CITES is certainly more specifically protective. Or perhaps flexibility is the key; and perhaps, then, this should be built into treaties, in recognition of inevitable self-serving of interests.

While it may be true that CITES is the 'most active and visible' of international wildlife-related treaties, and perhaps even the best-known of all international environmental legal treaties, it is not necessarily the best understood. It is strongly arguable that CITES is not always well-understood 'on the ground' (in other words, within national constituencies) - even by persons actively involved in decision-making that affects the international operation of CITES.⁹³³

Writing in 1985, Lyster states that the relative success of CITES can be attributed to a number of reasons, but mostly that of its administrative system. The existence of a permanent Secretariat and the numerous administrative obligations imposed on the Parties, he argues,⁹³⁴ are all critical factors operating to prevent CITES from becoming a 'sleeping treaty' ignored by its Parties. By demonstrating, he concludes, 'how to keep its Parties constantly on their toes, CITES has taught a lesson which other treaties concerned with the conservation of wildlife badly need to learn'.⁹³⁵

This lesson might be that it is possible for a Secretariat to be more active than might be expected from its original mandate; but the deeper lesson to be drawn might be that the original drafters of a treaty need to give it significant monitoring and enforcement powers, and thereby avoid the risk of a Secretariat acting as it should in order to fulfil its duties, but acting *ultra vires*. A question that might well be worth considering is whether the negotiators of the Convention on Biological Diversity, as the most recent international environmental treaty of the same scope as CITES, learned the lessons Lyster suggests should have been learned.

⁹³² S Lyster *International Wildlife Law* (1985) at 240.

⁹³³ See (n 470), (n 1226), (n 1658) and (n 2220).

⁹³⁴ S Lyster *International Wildlife Law* (1985) at 277. According to Sand, '[m]ost of the institutional structures of CITES emerged only after the treaty's entry into force, under the residual decision-making powers of the [COP]. A total of 190 recommendations adopted in the course of nine ordinary and two extraordinary meetings held since 1976 laid down a whole new body of rules - streamlined since 1994 in the form of 'resolutions', 'revised resolutions', and 'decisions'. Even though Conference recommendations interpreting and elaborating the text of the Convention are not considered legally binding, they have shaped the CITES regime in a manner hardly foreseeable at the time of its creation'. P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 21.

⁹³⁵ S Lyster *International Wildlife Law* (1985) at 277.

4.1.3 Membership of CITES

Initial growth of CITES membership was slow. At the time of present writing, however, membership stands at 173 - more than double the list of original signatories - and momentum was clearly gained.

Neither CITES nor the ICRW restrict membership. In Lyster's words, '[CITES] has no restrictions on participation other than that Parties must either be sovereign States or, under an amendment ..., regional economic integration organisations'. This amendment was adopted in order to allow the European Economic Community to become a Party to the Convention.⁹³⁶ In fact, there are no major trading States which are not party to CITES - with the exception of Taiwan. Taiwan's is a major omission, as it is a major trading force; but its problematic relationship with China, and that country's economic muscle, has thus far kept it out.⁹³⁷ The ICRW has a membership numerically less than one-half of that of CITES, even after a recent surge in membership; but, as will be seen, ICRW membership is growing - particularly in very recent years.

This philosophy of inclusiveness can arguably be seen as a weakness in CITES. Lapointe argues that 'the problem is that [] NGOs never totally left the arena, nor dropped that sector of influence where they had total hegemony. All this has resulted in a dual leadership: one official and one underground, and, in most cases, both are totally irresponsible and incompetent, because they have agendas and objectives irrelevant to conservation'.⁹³⁸ On the other hand, it has been argued that cooperation with IGOs and NGOs - particularly the IUCN, the WWF and the TRAFFIC network - has given CITES 'not only a high degree of transparency, but also what is probably one of the best operational information sources available to any environmental treaty'.⁹³⁹ Further, although not given as much formal recognition as in CITES, NGOs have over the decades played an important role in transforming the IWC.

4.1.4 The dual role of CITES

CITES is, according to Lyster, 'a protectionist treaty in the sense that it prohibits, with a few exceptions, international commercial trade in species that are threatened with extinction'; and at the same time is 'a trading treaty in the sense that it allows a controlled trade in species whose survival is not yet threatened but may become so ...'.⁹⁴⁰ Reeve writes that 'CITES is both a conservation and a trade instrument which attempts to reconcile the two often competing values'. CITES, she argues, is not '*per se* a treaty to promote trade and use of

⁹³⁶ *Ibid* at 7.

⁹³⁷ See (n 306).

⁹³⁸ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 21; 48.

⁹³⁹ P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 25. Sand tells us that '[t]he only leverage for external compliance control is Article XIII ('international measures'), which instructs the Secretariat to draw instances of non-compliance to the attention of the Management Authorities concerned, and subsequently, together with any comments received and follow-up information, to the attention of the [COP]. This provision gradually developed into a monitoring and verification process with active NGO participation. From 1976 onwards, an IUCN/SSC Specialist Group for Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC) started to collect information on alleged CITES infringements by wildlife traders and smugglers in different countries'. *Ibid* 19 at 25.

⁹⁴⁰ S Lyster *International Wildlife Law* (1985) at 240.

wildlife. The principal objective of CITES is and has always been to ensure that international trade does not lead to species extinction. In other words, CITES seeks to prevent unsustainable use, not to promote sustainable use over non-use'.⁹⁴¹ These assessments seem to imply that protection is the objective more than is facilitation of trade - or at least that the former slightly outweighs the latter.

This could be important insofar as it might suggest that too much protection, or at least a perception thereof, could explain state reluctance fully to embrace the philosophy of and obligations of CITES - while membership, and ratifications, of the treaty are high, enforcement is not as high as might have been hoped for.

Western feels that CITES is not a conservation treaty; but a trade treaty. In his view, the fact that CITES says nothing about appropriateness of measures inside countries shows that it really has to do with trade. He says that CITES is 'so singular in its approach that it doesn't have the sophistication to deal with more than trade'; and, in response to a question, agreed that the Convention on Biological Diversity would be a 'much better starting point' with so many more countries being involved.⁹⁴²

4.1.5 The enforcement of CITES

On enforcement, Reeve suggests further that '[CITES] is one of the oldest MEAs' and that it is '[a] specific tool rather than a global solution'.⁹⁴³ Probably what she means by this is that, like older MEAs, it concentrates on a particular issue rather than on a holistic approach - the latter approach being what the Convention on Biological Diversity arguably tries to take. On perceptions of CITES, however, Reeve suggests that CITES has, through its lifetime, been seen as 'the flagship wildlife agreement'. It is, she argues, 'a cornerstone MEA, lying at the nexus of international trade and species conservation, and largely respected among the conservation community'. She warns, however, that the perception of CITES 'must be qualified by saying that there has never been a thorough empirical assessment of the effectiveness of CITES'.⁹⁴⁴

Comparatively, CITES is certainly one of the oldest MEAs; but what does that say for the ICRW - which is 27 years *older*? Perhaps one of the most useful aspects to us today of examining such older treaties is to see what they have to say about the nature of international environmental law. That said, neither CITES nor the ICRW is in any way unnecessary. While there might be an argument to be made for subsuming the ICRW into CITES, as long as the CBD remains a 'disappointing tool' we need CITES.⁹⁴⁵ It is also interesting to comment on Reeve's suggestion that 'the specific and detailed provisions of CITES compare favourably with the CBD' - the ICRW is far more specific than is CITES, and this has led to paralysis within the treaty. Further, while Reeve suggests that 'most perceive CITES as effective', it can

⁹⁴¹ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 28-29.

⁹⁴² *Personal Communication* Interview with David Western, 8 October 2004, Nairobi: E Couzens.

⁹⁴³ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 6.

⁹⁴⁴ *Ibid* at 6. 'Nevertheless,' suggests Reeve, 'the specific and detailed provisions of this MEA compare favourably with the general and heavily qualified provisions of the 1992 Convention on Biological Diversity (CBD). As a framework agreement in all but name, the CBD is an attempt to provide a global solution but so far has proved disappointing as a tool to arrest the decline in biodiversity'. *Ibid* at 6. See 15.2 generally.

⁹⁴⁵ Of course, the CBD is an international treaty which will always need specific legislation - in the case of the CBD this largely means national legislation - to render it operable.

clearly only be said to be generally effective. On a daily basis, it is breached. Or perhaps it can be said to be effective, but only for its (limited) purpose.

Reeve does suggest that by operating through resolutions and decisions, through ‘soft’ law, the CITES regime has become ‘dynamic and flexible’ and able to ‘circumvent the delay imposed by treaty amendments’.⁹⁴⁶ One possible advantage of ‘soft’ law might well be that it enables participants to ‘feel’ their way toward what the law *ought* to be before it becomes binding. In this way, when international law becomes binding custom it is tried and tested as a true reflection of actors’ true beliefs and understandings.

There are, however, concerns about CITES. ‘After two decades,’ writes Sand, ‘the jury is still out on CITES ... The views of commentators vary, although most are favourable’.⁹⁴⁷ And de Klemm noted in 1993 that ‘[m]ore than two decades after the original Convention, only a small number of the contracting parties have ... enacted specific and relatively comprehensive legislation to implement it’.⁹⁴⁸

Perhaps what CITES lacks, and has lacked since its inception, it occurs to the present writer, is a true incentive, or system of incentives, for States party to embrace its requirements fully. According to the CITES Secretariat itself, ‘as a decision-maker in the trade chain, the public is a major stakeholder in the regulatory process. If the public does not understand or support the Convention, this makes the task of implementing CITES much more difficult and this, in turn, affects the effectiveness of the Convention’.⁹⁴⁹

In more than just the matter of national implementation, many states pay lip-service to their CITES obligations. Reeve comments that ‘[p]arties are required to provide biennial reports on their measures to implement and enforce CITES, but ..., the requirement is virtually moribund’.⁹⁵⁰ This is a serious problem. Without effective implementation, a treaty cannot work. A good example of a treaty that came into force but which, without implementation, became virtually a dead letter is the 1933 London Convention.⁹⁵¹ Although, of course, the London Convention was also simply overtaken by history (the decolonisation process, which created new states to which it purportedly applied, but by which it had not been drafted and which it did not suit), it had never been properly enforced even in its early years.

Reeve describes CITES as ‘a non-self-executing treaty, meaning that national legislation is required to implement several of its provisions. Parties are required to take measures to prohibit trade in specimens violating the Convention, and to provide for penalties for violations and for the confiscation of specimens. ... Annual reports on trade and biennial reports on measures taken to enforce CITES are to be submitted to the Secretariat and made publicly available unless this is inconsistent with a party’s laws’.⁹⁵² While it is easy to

⁹⁴⁶ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 41-42.

⁹⁴⁷ P H Sand ‘Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment’ (1997) 8 *EJIL* 29 at 35.

⁹⁴⁸ C de Klemm *Guidelines for Legislation to Implement CITES* (IUCN Environmental Policy and Law Paper) (1993) at 5.

⁹⁴⁹ ‘CITES explained in one paragraph’ *CITES World: Official Newsletter of the Parties* Issue Nr 17 - July 2006

<http://www.cites.org/eng/news/world/17.pdf> (accessed 27 October 2006) at 1.

⁹⁵⁰ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) 34.

⁹⁵¹ See 2.2.4.

⁹⁵² R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 52.

castigate states for not enforcing provisions of treaties to which they have become party; there might, of course, be many reasons why such enforcement does not happen.

Always, there is a watering down of meaningful obligations in multilateral environmental agreements. An extensive revision of the non-compliance procedure might improve the treaty's effectiveness, but would need to be carefully handled. Given CITES' history, the natural temptation would be to focus on giving more 'bite' to trade sanctions. However, these might not be the best form of sanction. Apart from possibly bringing CITES into conflict, thus far avoided, with World Trade Organisation rules, trade sanctions might be effective (especially as achieving the object of CITES) but would carry the inherent danger of implying recognition of CITES as a trade treaty - and perhaps even overemphasising this aspect at the expense of the conservation aspect. It has been suggested, by Reeve, that trade suspensions might be retained 'as a measure of last resort'.⁹⁵³

Enforcement is a thorny issue for both CITES and the IWC, with the IWC at times in its history facing even the more serious problem of falsified returns by States instead of the absence of returns.⁹⁵⁴ In the words of Rose and Paleokrassis, '[t]he ICRW leaves responsibility for implementation of the Convention entirely to its member nations', who are to 'take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against said provisions ...'.⁹⁵⁵ Enforcement is a problem for both treaties. Perhaps, then, the United States has resorted to a form of trade suspensions unilaterally to punish what it sees as breaches of the ICRW because of the absence of the CITES option of formal trade suspensions as a sanctioning mechanism. What this implies is that it is trade that is used as punishment, reinforcing the trade-related nature of the two treaties.

This trade-related nature is emphasised by Ong, who writes that '[s]uccessful as the Convention may be in providing for strict controls on trade in endangered species and their derivative products, it is at least arguable that the stated aim of CITES in terms of the protection of endangered species against over-exploitation though international trade controls implicitly acts to legitimise such trade in fact'.⁹⁵⁶ Pickover reinforces this perception, suggesting that 'one of the negative spin-offs of labelling certain species' as 'rare' is that it 'adds market value and increases demand'; with '[t]he decline of many species, in spite of their Appendix I listing, [being] ongoing because of the relentless demand for body parts and derivatives from established markets'.⁹⁵⁷ According to Sand, 'trade was readily identified as an issue where precautionary transnational action is both feasible and necessary - not only to avoid aggravating a multiple-cause ecological problem, but also to avoid a "free rider" dilemma lest unilateral bans penalize individual importing or exporting countries *vis-à-vis* their less scrupulous competitors'. Economic concerns, he continues, about having a 'level

⁹⁵³ *Ibid* at 156-158.

⁹⁵⁴ See 8.2.6.

⁹⁵⁵ G Rose & G Paleokrassis 'Compliance with International Environmental Obligations: A case study of the International Whaling Commission' in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 163-64.

⁹⁵⁶ D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 294.

⁹⁵⁷ M Pickover *Animal Rights in South Africa* (2005) at 55.

playing-field' in the world market therefore contributed also to the 'diplomatic negotiations leading up to the 1973 Washington Convention'.⁹⁵⁸

The truth might be that this is inevitable, inescapable, given the nature of world commerce and the state of conservation worldwide. Per Reeve, '[t]he worldwide commercial trade in wildlife, excluding fisheries and timber, has been valued variously at between US\$5 and US\$50 billion annually'; and '[i]n the UK alone, it is considered with some certainty to be worth several million pounds a year'.⁹⁵⁹

4.1.6 *The true role of CITES*

CITES is not designed in itself to protect or conserve endangered species, with the possible exception of species threatened with extinction and listed in Appendix I. Appendix I species are not available for commercial trade and are thus ostensibly protected against trade. They do, however, face other dangers. Reeve suggests that '[w]ildlife species face many threats, most of which are attributable to human activity. Destruction of natural habitats is recognized as the greatest threat. Others include the introduction of alien species, intensive agriculture and over-exploitation through domestic commercial use (e.g. the bushmeat trade) and international trade, not to mention climate change and ozone depletion. But even if wildlife trade is not the main cause of biodiversity loss, the pressure of international consumer demand adversely affects many individual species'.⁹⁶⁰ It may even be, for example, that zoos may contribute to the threats faced by endangered species, rather than assisting in their survival.⁹⁶¹ Labelling species as rare might well stimulate the desirability, and therefore the market, in such species. However, the alternative would be too difficult a weighing up and deliberate concealing of rarity.

CITES functions through a permitting system, which has in the past proved problematic and which did little - if anything - to stem the ivory trade in the 1980s. 'Although the CITES permit system', writes Ong, 'is the basic means to control international trade, in common with many international instruments it [CITES] does not provide for a detailed system of rules, relying instead on the discretion of its States Parties to interpret and implement their own permit procedures'. This lack of detail at base level, Ong suggests, 'has been criticised as a weakness in the CITES regime'; with the major flaw in the reliance on the permit system being its 'lack of emphasis on importing state controls, especially in the form of import permit requirements'.⁹⁶² In respect of ivory at least, the discredited permit system has been done away with. However, it remains in place for other species.

⁹⁵⁸ P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fnri.no/YBICED/997_01_sand.pdf) 19 at 19.

⁹⁵⁹ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 10-11.

⁹⁶⁰ *Ibid* at 8.

⁹⁶¹ M Pickover *Animal Rights in South Africa* (2005) at 63. On the issue of zoos, there are apparently about 800 regional breeding programmes or studbooks worldwide, under the auspices of the new World Zoo and Aquarium Conservation Strategy (WAZA), launched in 2005. This strategy stipulates that conservation must be the priority task for zoos; but calls also for 'a holistic approach, noting that only zoos, aquariums and botanic gardens can operate across the whole spectrum of conservation activities, from *ex situ* breeding of threatened species, research, public education, training, influencing and advocacy, to *in situ* support of species and their habitats'. P Dollinger 'Zoos promoting CITES' *CITES World: Official Newsletter of the Parties* Issue Nr 17 - July 2006 <http://www.cites.org/eng/news/world/17.pdf> (accessed 27 October 2006) at 12.

⁹⁶² D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 297.

Sand, however, comments that it is wrong to see CITES as a general wildlife management treaty - although whether it ought to be such being a different discussion. As it stands, according to Sand, CITES is 'but one component of the existing patchwork of global and regional wildlife regimes, narrowly focused on the transnational trade issue, which is only one of the multiple threats to wildlife; and hence should be judged by its contribution to mitigating that particular threat'.⁹⁶³ He argues that CITES has a broad role to play; since, unlike more specialised 'unit management regimes' (such as the IWC), CITES 'does not even control the actual taking of wildlife - be it through a moratorium or catch quotas, or through prescribed methods of capture'.⁹⁶⁴

4.2 The effectiveness of CITES

4.2.1 Compliance with CITES

In a rapidly changing world, of course, it was never going to be easy to create a treaty that could accommodate all interests. Treaties - multilateral environmental agreements - are of necessity changing. In particular, the increasingly influential position of developing countries within the CITES decision-making process can be seen as an example of democratisation of international environmental treaty regimes, as such treaties seek to accommodate many different perspectives and value orientations.⁹⁶⁵ Developing countries are increasingly aware of the bargaining power which they hold, in respect of their biodiversity and this awareness is reflected in more modern treaties. However, one must not overemphasise this point - it is still the developed countries which have most bargaining power in international *fora*. The subtle threat to destroy, or not to take sufficient care of, one's own natural resources can never be a particularly strong bargaining chip.

Compliance being one of the major problems for CITES, Reeve explains that there are two schools of thought on compliance theory: the 'managerial' school and the 'enforcement' school. The former 'holds that states tend to make efforts to comply with their treaty obligations and sees non-compliance as a problem of capacity, treaty ambiguity and/or uncontrollable social or economic change. Its proponents oppose the use of coercive sanctions, viewing them as ineffective and unsuitable. They advocate a non-confrontational, non-punitive approach to enhance compliance, involving increased transparency and what they term 'active treaty management'.⁹⁶⁶ Sand concurs, suggesting that '[i]t has long been recognized that most implementation gaps of environmental regimes are the result not of any premeditated violation of treaty obligations, but rather of institutional and financial constraints'.⁹⁶⁷ The second approach (as suggested by Reeve), on the other hand, 'argues that states calculate the costs and benefits when they choose whether or not to comply'; and Reeve suggests that 'while most implementation problems are not wilful violations, both "managerial" and "enforcement"

⁹⁶³ P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 26.

⁹⁶⁴ *Ibid* 19 at 26.

⁹⁶⁵ D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 314.

⁹⁶⁶ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 22-23.

⁹⁶⁷ P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 25-26.

instruments (i.e. “carrots” and “sticks”) are necessary for dealing with non-compliance’.⁹⁶⁸ There is less for states to ‘lose’ by joining (and implementing) CITES - after all, with the exception of those few states which benefit from large scale importation of species from other states, it is states’ *own* wildlife that is at risk. The ICRW, however, governs a commons in which states have less to lose. As to the ‘carrots and sticks’ approach, perhaps it is true, or at least strongly arguable, that ‘biodiversity of remedies’ is needed in order to protect biodiversity.

A number of commentators feel that CITES never did have a chance of working as effectively as intended. Parker writes that ‘I never concealed my belief that CITES was unworkable. ... decline ... is *not* the outcome of trade *per se*. There are many cases where commerce has not reduced populations and there are other reasons for decline - commonest among them being changed habitat. ... Thus if trade *per se* does not necessarily diminish wildlife, in what circumstances does it do this? The crucial factor seems to be the absence of a sense of ownership. Unsustainable harvesting happens most commonly with wildlife (and resources) over which there is no sense of ownership’.⁹⁶⁹ Parker then concludes that ‘where user rights have not been married to land tenure, conservation has seldom worked’⁹⁷⁰ and backs this up with the contention that ‘[w]hen laws enacted as a result of the 1900 and 1933 Conventions did not slow African wildlife decline, no-one noted that decline in species *not* traded at least matched and sometimes exceeded those which were’.⁹⁷¹ The question arises as to whether the London Convention can be seen as an early trade treaty. This is important, and almost certainly correct, particularly if one argues - as was raised earlier in this thesis⁹⁷² - that the London Convention influenced, or at least provided a precedent for, CITES in respect of the ‘categorisation’ of species. Parker’s argument is, of course, the ‘sustainable use’ argument - that not only is trade not a bad thing, but that it might even be a good thing. The allied argument that conservation does not work when not married to land tenure raises the philosophy behind the ‘CAMPFIRE’ approach to management of wildlife, and will be considered later.⁹⁷³

4.2.2 *Effectiveness, success and failure*

A rather different criticism to Parker’s comes from Pickover, who writes that ‘CITES has failed wild animals because it does not provide for issues of ethics and compassion. It remains silent on the basic ethical question of whether it is even appropriate to engage in international trade. It appears to be concerned not so much with protecting species as with allowing trade in endangered ones, which makes it almost Orwellian in character’.⁹⁷⁴ This is the argument that CITES, the Secretariat, the treaty as a whole, and the intent of the treaty, are too much in favour of the ‘sustainable use’ philosophy. The argument might be correct; but more probably it is correct only for certain times and in certain areas. The wording of the objects clauses of

⁹⁶⁸ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and* (2002) at 22-23.

⁹⁶⁹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 313-5.

⁹⁷⁰ *Ibid* at 313-5.

⁹⁷¹ *Ibid* at 313-5.

⁹⁷² See 2.4.

⁹⁷³ See 9.1.

⁹⁷⁴ M Pickover *Animal Rights in South Africa* (2005) at 54; and fn 18. Pickover suggests that ‘[t]he CITES Secretariat works exclusively with the [IUCN] and its members, and tends to disregard the input of other organisations, particularly animal protection ones. The Secretariat is also reluctant to share information with those who criticise the current sustainable use model’. Pickover is apparently relying on Reeve at this point (R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 69) but is putting Reeve’s suggestion too strongly.

the treaty, it appears to the present writer, is strongly rooted in protectionism - which makes sense given that the treaty's negotiations began in the late 1960s and early 1970s - but that, as will be argued later, the prevailing *zeitgeist* in the early 21st Century is more that of sustainable use.

Sand argues that CITES has a number of problems - and even that it 'may indeed have reached its outer limits'. The problems which Sand points to concern the influence of free trade areas with concurrent abolition of internal trade boundaries; the problems inherent in the inability to regulate trade in species that fall outside the treaty's ambit; and problems caused by competition from regional regulatory regimes.⁹⁷⁵

'Conservation ineffectiveness', writes Parker, 'had nothing to do with lack of law in Africa, but everything to do with lack of government probity, or will, or inadequate funding, or because the rules were simply inappropriate. If authorities did not enforce existing law for such reasons, why would they enforce CITES rules any better? If laws failed because authorities were too under-staffed or under-funded to apply them, the solution was adequate staffing and funding: not new law'.⁹⁷⁶ Parker explains that the 'manpower CITES needed for it to work' has never been estimated; and that 'conservationists rushed to list species on the Convention Appendices'.⁹⁷⁷ Reeve reinforces this, although with lower figures than Parker uses, stating that '[t]he three CITES Appendices contain over 30 000 species of fauna and flora, over 25 000 of which are plants. Most listed species are on Appendix II'.⁹⁷⁸

Parker makes the point, in relation to the particular issue of ivory, that '[f]rom the beginning the Secretariat faced an impossible task. ... [w]hile CITES was ineffective, it nevertheless made political sense for legitimate international ivory merchants to try to help it'.⁹⁷⁹ Arguing in favour of trade being necessary for successful conservation, Parker's line is that the ivory trade could have been controlled successfully and conservation thereby supported.

On numbers of species listed, as at June 2007, it appears that there are roughly 5 000 species of fauna and 28 000 species of flora protected under the three Appendices.⁹⁸⁰

Parker argues that CITES is not, in fact, a conservation treaty at all: '[w]hile technically a trade treaty, the Washington Convention was used by the conservation lobbies to stop trade. Any steps to streamline and improve ivory commerce would be opposed no matter how well founded the arguments. Talk of introducing a uniform marketing system was squashed, developed countries saying they could not force Africa to do what they did not want to do'.⁹⁸¹ 'Perhaps the most cogent comment on CITES', Parker continues, 'has come from actions taken by the [US] and the European Union. Both enacted national laws that override CITES and render the treaty obsolete'. If CITES was workable, he argues, 'there would have been no

⁹⁷⁵ P H Sand 'Commodity or Taboo? International Regulation of Trade in Endangered Species?' *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 26-27.

⁹⁷⁶ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 315-6.

⁹⁷⁷ *Ibid* at 315-6. 'Seemingly', writes Parker, 'the longer the appendix schedules, the better they felt they were conserving. In 1979 [] there were 527 species listed ... [n]ow, after an orgy of silliness, over 50 000 plant and animal species are on the CITES lists, each having to be recognised by its scientific name in archaic Latin or Greek'. *Ibid* at 315-6.

⁹⁷⁸ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 29.

⁹⁷⁹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 318.

⁹⁸⁰ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES' *Earth Negotiations Bulletin* Vol.

21 No. 51, 4 June 2007. This figure had not changed as at December 2008; see <http://www.cites.org/disc/species.shtml>.

⁹⁸¹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 321-3.

need for such additional national rules'.⁹⁸² A point that Parker misses, however, is that CITES actually states explicitly that States may take stronger action than does CITES.⁹⁸³ It is hard, therefore, to agree with his assessment that the treaty has been 'rendered obsolete', even if he is speaking only in the context of trade in ivory.

Lapointe argues that '[t]he international community must realize that banning trade and closing legal markets is not progressive conservation, but an anachronistic approach that does more harm than good. The people of developed nations have benefited from the use of their resources and are wealthier and healthier as a result. There is no ethical justification to deny people of less developed countries those same opportunities'.⁹⁸⁴ Arguably, however, there *is* such an ethical justification - that regardless of the rightness or wrongness of denying developing countries the same opportunity as was used by developed countries, it remains ethically wrong to use natural resources to the extent that the developed countries used them.

'More and more of the governments represented at CITES', continues Lapointe, 'have become aware that they have a national interest in paying attention to every item on the CITES agenda'; concluding that such governments are coming to 'understand that if they fail to support other governments that pursue sustainable use policies, they are weakening the entire concept of sustainable use'.⁹⁸⁵ This is an argument that can be used to justify, for instance, Senegal or Mongolia or Israel's accession to the ICRW. It cannot be denied that, as much as critics might argue that such joinders are merely opportunistic acts where the states involved would seem to have no direct interests, there *is* potentially important linkage.

It may even be that despite, or perhaps because of, its visibility, the importance of CITES is overstated. 'Because CITES is a principal forum for global interaction among nations', contends Lapointe, 'many consider it the major barometer for evaluating national conservation policies. ... In the real world, from the moment one refers to international cooperation, considerations of national policy objectives and diplomacy are brought into the mix. Quite often we find that, even within CITES, conservation digresses into a mere negotiating point - even a means to diplomatically segue in other issues - instead of remaining a primary objective. Within IWC, international cooperation does not exist'.⁹⁸⁶ Nevertheless, it cannot be denied that - whether there is one battleground or several - what happens at the high profile conservation fora provides crucial precedent. It is not because of the very importance of these fora that countries find it so difficult to agree within them; if the arguments were not of vital importance, compromise and resolution would be far easier to come by.

Reeve's major concern in regard to CITES is the problem of enforcement - in fact that, of all CITES' weaknesses, the lack of proper enforcement is the greatest.⁹⁸⁷ 'Enforcement', she writes, 'is the Achilles' heel of CITES. Effective enforcement turns the Convention from

⁹⁸² *Ibid* at 321-3.

⁹⁸³ Article XIV: 'Effect on Domestic Legislation and International Conventions'.

⁹⁸⁴ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 125-126.

⁹⁸⁵ *Ibid* at 125-126.

⁹⁸⁶ *Ibid* at 140-141.

⁹⁸⁷ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 248-49. She points out that '[a]s of March 2002, around 50% of parties still had legislation that failed to provide for some or all of the four basic requirements identified under the national legislation project: 1 a Management Authority and a Scientific Authority; 2 prohibition of trade in violation of CITES; 3 penalties for such trade; 4 confiscation of specimens illegally traded or possessed'. *Ibid* at 248-49.

paper reality into actuality. Ineffective enforcement undermines its very objective and every initiative to improve CITES implementation, from the national legislation project to the Significant Trade Review'.⁹⁸⁸ Parties, says Reeve, 'lack political will when it comes to even simple practical measures. A request from the Secretariat to Management Authorities in 1991 to provide the name of an enforcement body to assist the Secretariat with coordinating CITES enforcement activities produced replies from just seven parties. A more recent example is the poor response by parties to requests for information on elephant poaching and, in the case of ETIS, on illegal trade'.⁹⁸⁹ While lack of capacity is to some extent an excuse, frequently underlying this is a lack of political will'.⁹⁹⁰

The charge of lack of political will is problematic. It may well be that governments which act against their international obligations to increase environmental protection are, in fact, following the political will of their constituencies - many of which will not prioritise environmental protection over more immediate concerns. Countries have pressing domestic political, social and economic problems; and politicians may have relatively short careers.⁹⁹¹

Historically, the Secretariat of CITES has played an active role - even going so far as to provide its views, and give its personal opinions, on controversial proposals.⁹⁹² The current Secretary-General of CITES, Willem Wijnstekers, has written that 'things would ... be a lot easier if the public realized that live specimens are not exempted from CITES provisions, that taking specimens of Appendix-I species home is not allowed, but that there is no problem where non-commercial quantities of Appendix-II species are concerned'.⁹⁹³ While hedged with caution, assessments such as these clearly show that sustainable use is the most viable future path - at least in the Secretariat's view. This is, in fact, the direction in which the majority of the world's states appear to be heading firmly.⁹⁹⁴

⁹⁸⁸ *Ibid* at 249.

⁹⁸⁹ This is the reason for the delay in the Southern African ivory auction between 2004-2006; finally approved in mid-2007 at CITES COP 14, despite the lack of adequate such reports. See 5.3.19, 5.3.23, 5.3.24.

⁹⁹⁰ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 251.

⁹⁹¹ I am indebted to Jeremy Ridl, *personal communication*, in regard to this point. [Note: not through a formal interview.]

⁹⁹² R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 265. Reeve suggests that 'for the sake of its reputation and the proper operation of the Convention, the Secretariat's periodic tendency to stretch its powers needs to be addressed by parties'. *Ibid* at 265. Recently, for instance, although not a comment on a 'controversial proposal', the CITES Secretariat suggested that:

[a]ll too often, the popular 'don't buy' campaigns do not adequately distinguish between illegal and legal trade. They also blur the distinction between truly endangered species, in which commercial trade is generally prohibited, and the vast majority of CITES-listed species in which commercial trade is authorized. Such campaigns do not provide consumers with enough information on which to make balanced and informed decisions, tend rather to simplify complex management issues and overtly or covertly promote a generic 'trade is bad' message. This is clearly not in line with the trade provisions of the Convention. When overly broad, the 'don't buy' campaigns undermine legitimate trade that provides financial incentives for species protection and sustainable resource management, and they negatively impact on the livelihoods of communities.

S Nash 'Finding a simple way to explain CITES' *CITES World: Official Newsletter of the Parties* Issue Nr 17 - July 2006 <http://www.cites.org/eng/news/world/17.pdf> (accessed 27 October 2006) at 1.

⁹⁹³ W Wijnstekers 'Understanding CITES' *CITES World: Official Newsletter of the Parties* Issue Nr 17 - July 2006 <http://www.cites.org/eng/news/world/17.pdf> (accessed 27 October 2006) at 16.

⁹⁹⁴ See 12 and 16 generally.

The Standing Committee of CITES has become an influential decision-making body.⁹⁹⁵ ‘The lack’, suggests Reeve, ‘of a committee dedicated to issues concerning compliance, implementation and enforcement is a significant gap in the institutional makeup of CITES. ... CITES was adopted at a time when a separate compliance committee was not considered an institutional necessity. But experience in modern regulatory MEAs has changed this view’.⁹⁹⁶ This is perhaps an important comment on the differences between old and new multilateral environmental treaties.

Despite this assertiveness by the Secretariat and the importance of certain committees, Lapointe’s assessment is that ‘[t]he Parties to the Convention have never fully utilized the treaty’s full potential to create effective mechanisms for the conservation of wild species and their habitat’. He argues that CITES is, in itself, ‘an excellent international legal instrument’ which ‘contains the potential, through international trade activities, to benefit not only target species, but species sharing the same ecosystem and habitat as well, and human beings as well’. In this regard, he contends, ‘CITES has never realized a fraction of its potential’. His conclusion, however, is probably on the simplistic side; when he argues that this alleged failure ‘can be attributed to the simple fact that, in many instances, Parties to the Convention have forgotten the principles laid down in the treaty’s preamble’.⁹⁹⁷

In other words, the argument is that had CITES adhered to its (‘pro-trade’, according to Lapointe) purpose, instead of becoming bogged down in conflict, the Parties could have made better use of its scope for flexibility and become a truly effective instrument. Sand agrees that CITES has inherent flexibility; in fact that it was deliberately designed to be adaptable to changing circumstances.⁹⁹⁸

Criticism for CITES comes from Leakey, too; at least in respect of the ivory trade. He argues, once again, that the problem was enforcement; with the organisation having no way to enforce its own rules, or to impose fines on those who broke them. A further problem, in his view, was that ‘only those countries that had signed the CITES agreement were bound by it (in 1989, 117 countries were signatories). That meant that any country that hadn’t signed the agreement could act as a warehouse, storing and selling illegally obtained ivory’. He concludes, cynically, that ‘the more I found out about CITES and the ivory trade, the less sure I became

⁹⁹⁵ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 267-68. Reeve explains that ‘[g]uidelines exist on the duties of regional representatives. ... While [these] fall short of an overtly expressed duty to *represent* the opinions of other parties in the region at Committee meetings, it can be argued that it is implicit. Perhaps not surprisingly, this duty is not always fulfilled. This was plainly evident at SC41 in February 1999, when the ivory sales were approved. Three of the four parties wanting to trade ivory (Japan, Namibia and Zimbabwe) were members of the Standing Committee: Japan and Namibia were regional representatives with votes, while Zimbabwe was there by virtue of its role as host of COP10. However, instead of representing its region, Japan represented Japan - an ivory consumer - not even paying lip service to India’s strongly held position opposing the trade. Namibia represented Namibia and the ivory trade lobby, and though several southern African states supported the ivory sales, not all did, Zambia being a case in point’. *Ibid* at 267-68.

⁹⁹⁶ *Ibid* at 269.

⁹⁹⁷ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 126-127.

⁹⁹⁸ P H Sand ‘Commodity or Taboo? International Regulation of Trade in Endangered Species?’ *Green Globe Yearbook 1997* (available online at http://www.fni.no/YBICED/997_01_sand.pdf) 19 at 22. Sand suggests in this regard that, ‘[u]nlike its fatally immutable 1933 forerunner, CITES was deliberately designed as a flexible instrument that would adapt itself to changing circumstances (through its accelerated amendment procedure for species listed on Appendices I-III, a technique borrowed from other treaties and to a certain tolerable amount of deviation from full compliance ... through a system of reservations which allows dissenting countries to opt out of collective decisions about species listing ... and through a number of loopholes intentionally built into Article VII to deal with exceptional situations, such as specimens acquired prior to the Convention’s entry into force (the ‘grandfather clause’ already found in the 1900 London Convention)’. *Ibid* 19 at 22.

that there was any way to manage it legally. As long as ivory was considered a valuable commodity, there would be a black market for it. Despite CITES and its well-intentioned rules, the ivory trade was clearly corrupt, and no matter who regulated it or what system they put in place, it would always be corrupt. The high price assured that'.⁹⁹⁹

This, of course, describes CITES as it was up until 1989. In respect of the ivory trade, Leakey might well now agree that a CITES Appendix I listing can be effective - the ivory trade having largely ceased after the 1989 CITES Appendix I listing, for which Leakey had campaigned. The potential problems, however, remain.

Bonner tells us that '[t]oday, most conservationists would argue that CITES has failed to live up to its noble intentions. Part of the responsibility for this failure lies with the secretariat, which has been far too favorably disposed toward traders. But the governments of the world, including the 117 [writing in 1993] that have signed the treaty, bear more responsibility. To begin with, the signatories have given no enforcement powers to the secretariat. Nor have they given the secretariat ... enough money to control the trade or even to monitor it effectively. ... Consequently, if the treaty's goals are to be realized, individual nations must enforce its provisions. Most have lacked either the ability or the desire - or both - to do so'.¹⁰⁰⁰ Bonner therefore agrees with both Reeve and Leakey on the enforcement problem within CITES; and impliedly suggests that Parker is not correct in arguing that the treaty has been 'rendered obsolete' by the unilateral actions of States - in fact, quite the opposite.

The suggestion has been made, by Lapointe, that one of CITES' major problems is the involvement - and undue influence - of non-governmental organisations. He argues that 'the 7th meeting of CITES, in Switzerland in 1989 is by far the best example of the total domination of non-elected bodies over sovereign States represented within the CITES community'.¹⁰⁰¹ The 'total domination' referred to concerns, as will be seen below, the decision to list the African elephant on Appendix I - it is certainly true that the 1989 CITES COP saw a significant public relations effort by NGOs reach a successful climax; however, to argue that they were wholly responsible, or that they have always exercised so important an influence, would be to claim too much.

According to Reeve, efforts to improve CITES' enforcement mechanisms have been made, but have not been successful. 'Since 1989', she comments, 'there have been several attempts to establish a permanent enforcement working group or committee within the CITES system, but all have failed'.¹⁰⁰² She argues that it does not appear as though such attempts are still being seriously made; and she ascribes this largely to the role of the Secretariat; for reasons that are not clear.¹⁰⁰³ '[O]ne thing is clear', she argues, is that 'had it not been for active opposition by a far from neutral Secretariat, some form of permanent enforcement body could well have been part of the CITES institutional makeup by now'.¹⁰⁰⁴ To be fair, though, she does concede that

⁹⁹⁹ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 42. 'For instance', writes Leakey, 'Belgium imported five hundred tons of ivory in the early 1980s, then sold it; only after unloading the ivory did it join CITES. Similarly, Burundi, a tiny country in the middle of Africa, has no elephants of its own. Yet between 1979 and 1987 it exported nearly fifteen hundred tons of tusks'. *Ibid* at 42.

¹⁰⁰⁰ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 95.

¹⁰⁰¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 127-128.

¹⁰⁰² Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 225-27.

¹⁰⁰³ *Ibid* at 225-27.

¹⁰⁰⁴ *Ibid* at 225-27.

this does not, however, mean that the Secretariat is unconcerned about enforcement - certain efforts having been made in this regard.¹⁰⁰⁵

Kreuter and Simmons comment on the lack of enforcement ability within CITES, arguing that it might not be because of the Appendix I listing that the ban on the ivory trade has been - by and large - successful. 'Since the signatories to CITES gave its secretariat no enforcement powers', they write, 'nations have to independently enforce its provisions but most have lacked the ability or will to do so. Moreover, since ivory trade has always consisted of an illegal component and trade bans provide no incentives for increasing management expenditures, it was predicted that banning ivory trade would provide incentives for expanding its illegal component and that there would be little shift in supply.'¹⁰⁰⁶ ... It is thus important to recognize that the apparent success of the ivory-trade ban in closing most international markets and effective elephant conservation are not synonymous'.¹⁰⁰⁷ This takes one back to the criticism of CITES that the treaty in fact stimulates trade.

4.2.3 *CITES and the ICRW*

It has been written that '[o]ver the years, a number of CITES resolutions have dealt with the organisation's relationship to the IWC. All of these resolutions have been based on the assumption that there is conformity between the agendas of CITES and the IWC, and that IWC policy is based on conservation, biological criteria and scientific advice - not whale rights and public sentiment'. However, CITES was later, in the 1980s, to assume 'an independent position in relation to the IWC by listing whale populations for which the IWC was still setting commercial quotas in Appendix I. This applied to the populations of sei whales, fin whales and Bryde's whales'. Such independence could, arguably, 'be said to have implied indirect criticism of the IWC for allowing the commercial harvest of populations whose statuses (at the time) was uncertain'.¹⁰⁰⁸

Thus, there are ironies. One is that CITES was once more protective than the IWC, and so parties within it tried to 'take over' the role of the IWC- but that today CITES is being used by the parties who had, then, kept the IWC running as a use-oriented organisation, to undermine the IWC today. It is one of the contentions of this thesis that it is currently impossible fully to understand either treaty in isolation from the other.

¹⁰⁰⁵ *Ibid* at 227-29.

¹⁰⁰⁶ U P Kreuter and R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 47-9.

¹⁰⁰⁷ *Ibid* at 47-9.

¹⁰⁰⁸ 'CITES and the IWC: The Fall of Conservation? The Downlisting of Minke Whales in the North Atlantic' High North Alliance Publication issued in conjunction with the 1997 CITES meeting in Harare, available on <http://www.highnorth.no/Library/Trade/CITES/ci-an-iw.htm> (accessed 12 May 2006) at 5.

5 CITES and elephants

5.1 East Africa, ivory and the 1989 CITES COP

5.1.1 *The 1970s and the mass slaughter*

In the early 1970s there was little call for a ban on trade in elephant ivory. The Douglas-Hamiltons write that '[a]t that time the conventional view of elephant conservation was that it was more important to win the co-operation of the ivory trade rather than try and close it down'. They point out that 'even' the World Wildlife Fund and the [IUCN], followed this philosophy; and that the WWF had become the world's leading fund-raising conservation organization, with the IUCN as its scientific partner. Both these bodies, they say, worked closely with CITES'.¹⁰⁰⁹

By the mid-1970s, however, it was becoming apparent that elephants were in increasing trouble. The Douglas-Hamiltons write that '[b]y the end of 1977 we could prove that Kenya had lost at least half her elephants since 1970'.¹⁰¹⁰ Kenya, however, then became the first range state to take steps to control the ivory trade. In the Douglas-Hamiltons' words, '[in December 1977] President Kenyatta [] announced a ban on all trade in ivory to come into effect in the new year'. They describe Kenyatta's decree as having been 'a revelation', and query what might have made him take that decision; speculating that it might have been that the price of coffee had soared, providing more lucrative returns than ivory for the moment. Alternatively, they speculate further, it might have been the power of the media, the word of the scientists or discreet persuasion through diplomatic channels that finally made some impression; but advise that we will probably never know. However, they say, 'all those months ... suddenly seemed worthwhile. If Kenya led the way, maybe others would follow'.¹⁰¹¹

Although admittedly written with hindsight, these words sum up much of what was to happen. From a morass of competing interests, a range state took a decision which was not apparently in its own immediate interest - and much of the rest of the world *did* eventually follow suit.

Parker writes of Kenya that '[t]he hunting ban in 1977¹⁰¹² and the revocation of all dealer's permits in 1978 were supposed to have ended all hunting, capturing and trading wild animals or their parts and derivatives.' Kenya, Parker cynically explains, had formally acceded to CITES in 1979, but the country had 'paid lip-service' to its rules 'since its inception'.¹⁰¹³ Yet today Kenya is now a leading protagonist in CITES. So, like many such, Kenya's current 'preservationist' stance may have its origins in cynical motives.

¹⁰⁰⁹ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 29.

¹⁰¹⁰ *Ibid* at 114. The Douglas-Hamiltons write that '[i]n June 1976 David Sheldrick told [of] the results of the latest Tsavo count. He looked tired and dispirited. "We have lost [15 000] elephants in two years", he said wearily. "That's [44%] of the population. Not even the drought was able to achieve that kind of drop. I'm afraid that if things go on this way the park will be nothing but an empty shell before the end of the year" ...'. *Ibid* at 110.

¹⁰¹¹ *Ibid* at 126.

¹⁰¹² Most commentators refer to this as a 'ban' - however, Western told me that it was, and remains, a 'suspension'.

Personal Communication Interview with David Western: E Couzens 8 October 2004, Nairobi. See (n 1014), (n 1653) and (n 1114).

¹⁰¹³ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 187.

Bonner writes that ‘Kenya banned [hunting] in 1977, and many conservationists think it is time to permit it again. The ban was not imposed for moral or ethical reasons, but in response to pervasive corruption’.¹⁰¹⁴ Olindo,¹⁰¹⁵ he says, supported the decision to ban hunting, but noted that it was ‘never intended to be permanent; it was to last only until the poaching could be brought under control’.¹⁰¹⁶ According to Bonner, further, ‘[i]n 1978 Kenya had banned all trading in wildlife products (it was the effort to stop the poaching, after the ban on sport hunting imposed the previous year had failed to do so)’. Bonner then describes Leakey as believing in sustainable utilization and believing therefore that ‘Kenya’s laws and policies must be changed’, and that there must be ‘consumptive utilization’ of wildlife. Consumptive utilization, which, per Bonner, ‘is something of a euphemism for killing wild animals for commercial purposes’, Leakey apparently described in 1990 as a ‘mechanism for getting benefits to people who conserve wildlife’.¹⁰¹⁷ So, according to Bonner, Leakey is not a ‘preservationist’. In Leakey’s own words, however, he does appear to be.

On the devastation wrought by poachers at the time, Meredith writes that ‘[j]ust when scientists were beginning to understand the true nature of elephants, a new onslaught was unleashed against elephant populations across Africa. Starting in the early 1970s, it lasted for nearly two decades and cost the lives of hundreds of thousands of elephants, bringing some populations close to extinction’.¹⁰¹⁸ Meanwhile, Meredith explains, ‘wildlife scientists and officials fell into a protracted dispute about the gravity of the problem. In wildlife circles, it became known as the Ivory Wars’. He tells us that the first signs of the onslaught appeared in Kenya in 1971 with influxes into Tsavo Game Reserve of hunters armed with automatic weapons.¹⁰¹⁹

According to Meredith, ‘[i]nternational efforts to control the ivory trade came to nothing. In 1976, at the inaugural Conference of the Parties to the Convention on International Trade in Endangered Species of Flora and Fauna (CITES), the African elephant was listed on Appendix II. This meant that ivory exports required an export permit, but the system was open to any amount of abuse’.¹⁰²⁰ At the time, apparently, many people prominent in conservation circles, such as Richard Laws, still argued that the greatest threat facing elephants in East Africa ‘was overpopulation in protected areas for which the solution was culling’.¹⁰²¹ The question was asked, as Meredith phrases it, whether elephants should be allowed to find their own level ‘in relentless competition with other species’ for limited resources; or whether they should be ‘brought into balance with the environment and other species that inhabit it?’.¹⁰²² An implication of this is that conservationists have argued in favour of culling for decades. The allegation of (elephant) overpopulation has been with us for that long too.¹⁰²³

Major disagreements as to the course which should be followed were beginning to appear amongst some of the chief protagonists. The Douglas-Hamiltons suggests that ‘[in 1978] ...

¹⁰¹⁴ R Bonner *At the Hand of Man: Peril and Hope for Africa’s Wildlife* (1993) at 242.

¹⁰¹⁵ Perez Olindo; then Director of the Kenyan Wildlife Conservation and Management Department.

¹⁰¹⁶ R Bonner *At the Hand of Man: Peril and Hope for Africa’s Wildlife* (1993) at 242.

¹⁰¹⁷ *Ibid* at 216.

¹⁰¹⁸ M Meredith *Africa’s Elephant: A Biography* (2001) at 201-3.

¹⁰¹⁹ *Ibid* at 201-3.

¹⁰²⁰ *Ibid* at 204-5.

¹⁰²¹ *Ibid* at 204-5.

¹⁰²² *Ibid* at 204-5.

¹⁰²³ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 121.

Parker was rushing to finish the Ivory Trade Study, ... [and] it was clear that Parker and I differed fundamentally in our perception of the terms of reference. ... My aim was to expose illegal traders'. 'Parker', on the other hand, 'wanted a greater understanding of the traders and an end to their harassment by conservationists. ... His ivory study began to read like a whitewash. ... His major conclusions were that, the ivory trade was not excessive; it had not brought about widespread declines; it had not undermined law enforcement; and other than at a local level, it was not causing the elephants any danger'.¹⁰²⁴ Loosely put, these protagonists comprised those who felt that it was necessary to control the trade while reaping its benefits, and that such control was possible; and those who were beginning to feel that a complete ban was what was required.

The permit system did have its defenders. Lyster tells us that '[i]n September 1982, coinciding with the entry into force of new regulations to implement CITES, the Zimbabwean Management Authority initiated the use of a security stamp on all CITES export documents, making Zimbabwe the first Party to adopt this procedure. Because of the particularly serious problem of illegal trade in African elephant ivory, the New Delhi Conference approved a special marking system for ivory using punch-dies. CITES security stamps were supplied to all interested parties in June 1984'.¹⁰²⁵ Per Lyster, while '[i]t would be misleading to suggest that the permit system always works perfectly', it has, 'on the whole' proved to be 'relatively effective'. Much of the credit for this, he says, 'is due to the administrative structure of the Convention'.¹⁰²⁶ This is an early comment, however - 1985. It was later that it became clear that the permit system simply was not working - although even then it had its defenders, such as Lapointe, Parker, and Martin.

Meredith suggests that in 1979 two major reports were published in 1979; both of which were 'swiftly engulfed in controversy'. Iain Douglas-Hamilton, he says, 'called for measures both to reinforce protected areas and to tackle the burgeoning illegal ivory trade'; while Ian Parker 'provided a mass of new detail about the workings of the ivory trade', confirming that 'the trade had reached levels not seen since the early twentieth century' and calculating that 'between 1973 and 1978 about 1 000 tons of ivory a year had left Africa'.¹⁰²⁷ However, Parker apparently concluded that the ivory trade was 'not excessive'; and in fact that it 'fell well within sustainable limits; and that it did not threaten the elephant's survival'. If anything, Parker allegedly said, 'the threat came from population growth and loss of habitat'; and he 'went on to accuse conservationists of using false statistics to conjure up an elephant crisis to enable them to raise funds for their own purposes'.¹⁰²⁸ This represents, therefore, an early accusation of hypocrisy by 'conservationist' ('preservationist') NGOs - a charge which is more regularly made today.

It seems with hindsight that Douglas-Hamilton's figures were probably the more accurate; and that elephants were in serious danger from increasing poaching. Meredith explains that 'Parker's position was fundamentally flawed'; and that '[h]e had underestimated the real impact of the ivory trade by failing to take account of the way in which an ever-increasing toll

¹⁰²⁴ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 172-173.

¹⁰²⁵ S Lyster *International Wildlife Law* (1985) at 255.

¹⁰²⁶ *Ibid* at 241.

¹⁰²⁷ M Meredith *Africa's Elephant: A Biography* (2001) at 206-9.

¹⁰²⁸ *Ibid* at 206-9.

on elephant populations was needed to sustain the same volume of trade'.¹⁰²⁹ Gavron supports Douglas-Hamilton's figures, suggesting that 'Douglas-Hamilton published his second major elephant estimate. There was still a lot of guesswork, especially from the dense rain forest in the centre of the continent. But the numbers were now far more accurate. The new figure was [750 000]'.¹⁰³⁰

5.1.2 *The 1980s and rising concern*

It is not certain whose original idea a ban was; although probably, of course, it does not really matter as what is important is the response to the idea. The Douglas-Hamiltons write that '[e]arly in 1984 the European Community quite spontaneously came up with a resolution tabled by a British MP, Stanley Johnson, to ban the ivory trade'. They then explain that '[t]his provoked such a furore of outrage from the conservation establishment that the legislators who had proposed it were quite taken aback'; and that '[t]hey agreed to re-draft their proposals so that they would strengthen controls, but not make any outright ban or inhibit the legitimate trade in ivory so beloved by the CITES secretariat'. Even so, they conclude, 'the [S]ecretariat, ... were against any legislation, saying that their proposed quota system should first be established'.¹⁰³¹

Poole writes of the quota system that '[i]n 1985 CITES acknowledged that a huge portion of the ivory trade originated from illegally killed elephants and it adopted an ivory quota system to try to bring the trade under control'. The basis of the system, she explains, was that 'each country with elephants would declare an annual export quota of ivory, which it would not surpass'; and that every tusk leaving Africa would require an export permit, with the issuance of these permits being controlled by the producer states, in collaboration with the CITES Secretariat.¹⁰³²

According to Meredith, '[a]cknowledging that more needed to be done to protect the African elephant than listing it on Appendix II, a CITES conference in 1985, attended by representatives from nearly 100 member states, authorised the establishment of a quota system intended to bring the ivory trade under closer control'. He explains that the authorised quota system required that each ivory-producing state (that was also a CITES party) should set an annual quota for the amount of ivory which it would export; with this quota to be based on a domestic management programme put in place for the sustainable utilisation of its elephant stock. Exporting states, he records, were 'required to notify the CITES Secretariat of any ivory consignment exported under its quota and to mark each tusk indelibly to identify its quota number'; and '[i]mporting states were required to accept only ivory shipments covered by valid documents'.¹⁰³³

This, of course, is how the quota system was *supposed* to work. Meredith's judgment, however, is that '[t]he quota system was a total failure'. He ascribes this to the influence of 'legions of armed gangs, corrupt officials, greedy politicians and rich traders at work in the trade'. The CITES Secretariat was unable to enforce the rules; and it effectively accepted

¹⁰²⁹ *Ibid* at 206-9.

¹⁰³⁰ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 130.

¹⁰³¹ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 268-269.

¹⁰³² J Poole *Coming of Age with Elephants* (1996) at 191.

¹⁰³³ M Meredith *Africa's Elephant: A Biography* (2001) at 211-214.

money from the fox for the guarding of the henhouse - its own 'ivory unit', writes Meredith, was so underfunded that to keep working it required 'donations' from wealthy ivory merchants. Between 1985 and 1989, he writes, 'two-thirds of its budget was provided by ivory dealers'. The belief of the CITES Secretariat, however, was that the quota system would work - given sufficient time; and that to work through a ban would be to risk driving the trade underground.¹⁰³⁴

Much the same argument is made today, that poaching will not cease until the legal trade is reinstated and functioning efficiently. In fact, this argument is arguably the driving force behind CITES as a trade treaty - perhaps even its *raison d'être*.

The influence of ivory traders at the time was far greater than it is today. The Douglas-Hamiltons write that when, in 1986, it became public knowledge that some 60% of the CITES Secretariat's 'ivory unit' operations were financed by the ivory trade 'it was easier to understand why they had behaved with such secrecy and protectiveness, although it is only fair to record that the CITES parties had agreed that the ivory unit should be allowed to raise finance from external sources'.¹⁰³⁵ 'There was nothing', they add, 'illegal in these transactions but their revelation left CITES' credibility badly damaged'.¹⁰³⁶ Those conservationist NGOs which eventually pushed hard for an ivory ban were to make much of these links between the traders and the CITES Secretariat.

Jackson writes that '[i]n response to international pressure, Japan finally imposed strict import legislation in 1986'.¹⁰³⁷ The pressure on natural resources was, however, mounting rapidly. Gavron writes that '[t]he black rhino population had fallen from seventy thousand to four thousand. The last large population was in the Zambezi Valley in Zimbabwe. Here even the shooting of more than [50] poachers in five years had failed to stop the killing of rhinos'.¹⁰³⁸ It is interesting, given later and present controversies, to note that even at a fairly early stage a 'shoot-to-kill' policy was being used to protect certain species in the 1980s furore.

The slaughter raged on. Leakey writes that '[b]y the late 1980s, it [elephant poaching] had become nearly a continent-wide plague'; and that '[i]vory-hunting poachers, many armed with Kalishnikova AK-47 assault rifles, were slaughtering elephants from Kenya and Tanzania to the Central African Republic and Angola'. In some countries, such as Uganda and Sudan, he says, 'where more than a hundred thousand elephants had roamed in the 1970s, you would have been hard-pressed, ten years later, to find ten thousand'. In Tanzania, he records, where 100 000 elephants had lived in the Selous Game Reserve in 1976; a decade later, that figure had dropped to 55 000. Three years after that, in 1989, the figure stood at a mere 27 000. In Kenya, according to Leakey, 'we were down to fewer than [20 000] elephants - and still losing on average three elephants a day'. It didn't take a genius, he says, 'to figure out that such a high rate of killing couldn't go on indefinitely' and that 'the African elephant was clearly headed for extinction throughout much of its range'.¹⁰³⁹

¹⁰³⁴ *Ibid* at 211-214.

¹⁰³⁵ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 297.

¹⁰³⁶ *Ibid* at 336-337.

¹⁰³⁷ P Jackson *Endangered Species: Elephants* (1990) at 102.

¹⁰³⁸ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 131.

¹⁰³⁹ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 36.

Politics and the poaching of ivory went hand-in-hand. Leakey writes that '[m]ore was involved than elephant poaching in Kenya. It was widely believed that Somali incursions were simply the first step in a full-fledged invasion, similar to Somalia's attack on Ethiopia'. The poaching, he says, 'came to be seen as part of an effort by Somalia's president Muhammad Siad Barre to ruin Kenya's economy and destabilize its government'.¹⁰⁴⁰ Leakey is *ad idem* with Parker here - although it seems unlikely to me that it was a carefully planned effort to destabilise, rather than commercial and opportunistic incursions.

It was not only in East Africa that poaching was rife. Parker suggests that he 'knew of only three countries where ivory was openly and properly accounted for: Botswana, Malawi and Zimbabwe'.¹⁰⁴¹ Even when states apparently took steps to halt the slaughter and the trade, these efforts were strongly hedged with self-interest. According to Reeve '[i]n 1989 the UAE came under strong pressure to stop the trade in ivory, which at the beginning of the year was still flourishing'; and that '[i]n a report distributed at COP 7 in October 1989, [the NGO] EIA claimed that over 1 000 tonnes of illegally obtained ivory had passed through Dubai since 1984'. In contrast, she says, the official figures released from Dubai reflected merely that the UAE had imported only some 42 tonnes of 'unworked or simply prepared ivory' in 1987, with the figures being only 24 tonnes in 1988 and less than two tonnes in 1989. The UAE, according to Reeve, 'had actively facilitated the ivory trade by notifying its withdrawal from CITES just one month after traders from Hong Kong had been issued licences to set up further factories'.¹⁰⁴²

Actions were, however, beginning to be taken. Reeve tells us that in 1986 'unilateral action was taken by the United States under the Lacey Act'.¹⁰⁴³ On 25 September 1986 the US Fish and Wildlife Service (USFWS) banned all wildlife imports from Singapore, citing the country's inability to provide 'comparable documentation'.¹⁰⁴⁴ The United States was therefore acting unilaterally in respect of elephants, which it had really only *threatened* to do in respect of whales.

Parker writes that although '[b]y 1985 all ivory producing nations and all major ivory consuming nations were Parties to CITES'; there were still 'three entrepôts that bucked the system'. These were Singapore, which was not a party 'and placed no restrictions on importing and exporting ivory'.¹⁰⁴⁵ Dubai was the second non-conforming nation, although it was 'nominally a Party to the Convention'.¹⁰⁴⁶ Burundi, however, writes Parker, 'was altogether different. ... Where Singapore and Dubai were wealthy, Burundi was one of the world's poorest states, and surrender over ivory could have [had] serious general economic

¹⁰⁴⁰ *Ibid* at 68-9.

¹⁰⁴¹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 269. Parker writes of South Africa that 'I had little confidence in South Africa after finding that the Kruger National Park directed a portion of the Park's ivory production at a price well below international level into the hands of one company. The arrangement may have been innocent, yet, with a cynicism born of experience, and noting that the company's principal shareholder was the then Director of National Parks' son-in-law, I would not have bet on it'. *Ibid* at 269. This is the only reference to this allegation which the present writer has found.

¹⁰⁴² R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and* (2002) at 104-106.

¹⁰⁴³ 16 U.S.C. §701 May 25, 1900. This Act authorises the US Secretary of the Interior to take measures to restore wildlife to parts of the US in which they have become extinct, and to regulate the introduction of wildlife (either American or foreign) into areas where they do not occur naturally. See, for instance, 'Lacey Act'

<http://ipl.unm.edu/cwl/fedbook/laceyact.html>.

¹⁰⁴⁴ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 129-130.

¹⁰⁴⁵ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 286-7.

¹⁰⁴⁶ *Ibid* at 286-7.

implications. Consequently Burundi resisted pressure to stop trading ivory and was averse to joining CITES'.¹⁰⁴⁷

This provides us with an interesting case study of how international pressure affects different states differently. It would appear to be as difficult to persuade a poor state as to persuade a rich one to act in a way that is not directly in its, at least short-term, interest; determining the reasons for state actions, and the factors that influence particular states in particular situations, is not easy.

Meredith tells us that '[a]ll [of] the arguments over the ivory trade raged anew at a meeting of the Elephant Specialist Group held in Nyeri, Kenya in 1987. A strong case for supporting the trade was made by Rowan Martin, a respected scientist from Zimbabwe'. Martin, he says, 'had been one of the principal architects of the quota system'; arguing that 'high prices for ivory, far from threatening elephant populations, provided the means to protect them. What was needed in Africa, he said, was an effective system of protection and utilisation, like the one that Zimbabwe operated'.¹⁰⁴⁸ This remains the Southern African view, in the Twenty-First Century. 'But', continues Meredith, 'CITES did nothing about the trade. The reason was that the prevailing policy within the world's conservation establishment - including the IUCN, the World Wildlife Fund and CITES - was to support sustainable utilisation'.¹⁰⁴⁹ In a sense, then, it can be argued that sustainable utilisation *was* the dominant idea; and that it went 'underground' for some years, but is now back again. 'The position', per Meredith, 'of both South Africa and Zimbabwe was that the proceeds of wildlife farming could be used to raise the standard of living for growing human populations without endangering the survival of wildlife, as their own experience showed'. All this, he concludes, 'provided a significant underpinning for the policy of sustainable utilisation advocated by the IUCN, WWF and CITES'; as they 'argued in favour of co-operation with the ivory trade as the best means to control it'.¹⁰⁵⁰

On the growing feeling that a ban might become necessary, and on increasing awareness of the full implications of poaching; the Douglas-Hamiltons write that '[a]t the end of ... [1987 David] Western ... would not yet go for an ivory ban, wanting instead further dialogue with traders, [but] he threw his full weight into confirming that the trade was the principal cause of elephant decline', and they credit Western with coining a 'splendid phrase' referring to elephants as 'flagships for conservation'.¹⁰⁵¹

On the decreasing numbers of elephants, the Douglas-Hamiltons write that '[t]he total count in 1988 of the Tsavo ecosystem including the Galana Ranch and Mkomazi National Park across the border in Tanzania produced a minimum of 5 363 elephants - a 79 percent decline since 1972. Given the undercount factors there were probably around six thousand elephants in all'.¹⁰⁵² In Central Africa, they add, 'the elephants were down by [80%]. Selous was down by half and Tsavo had lost at least three-quarters'.¹⁰⁵³ On the subject of elephant numbers, Chadwick writes that '[o]f the hundreds of thousands of elephants found in the [Central

¹⁰⁴⁷ *Ibid* at 286-7.

¹⁰⁴⁸ M Meredith *Africa's Elephant: A Biography* (2001) at 214-216.

¹⁰⁴⁹ *Ibid* at 214-216.

¹⁰⁵⁰ *Ibid* at 214-216.

¹⁰⁵¹ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 306.

¹⁰⁵² *Ibid* at 312.

¹⁰⁵³ *Ibid* at 317.

African Republic] just two decades earlier, at least [90%] were gone. As in Kenya, the survivors had banded together into frightened, often leaderless, and endlessly harassed refugee groups wandering from one region to the next in search of asylum'.¹⁰⁵⁴

An important new player now joined the debate. The Douglas-Hamiltons write that '[t]he report ... was warmly acknowledged in a letter to us by Richard Leakey, chairman of the East African Wildlife Society. Leakey had not until then been actively involved in the politics of elephant conservation'.¹⁰⁵⁵

5.1.3 *The idea of a complete ban*

The Douglas-Hamiltons' view became that a total ban was necessary; arguing that they felt that 'Perez [Olindo] was wrong in believing that a value always had to be attached to tusks'. Olindo was apparently 'not willing to make a break with the thinking of the past which insisted that the ivory trade could never be stopped'; and that 'a better policy on tusks was to devalue them'.¹⁰⁵⁶

According to the Douglas-Hamiltons, however, '[a]ll our experience of twenty years told us that any value attached to tusks would result in them being over-exploited'.¹⁰⁵⁷ The Douglas-Hamiltons offer a rationale for this; and in so doing raises an interesting point about Japanese strategies in international law. 'The main economic force', they write, 'behind the ivory rush was revealed to be the increased prosperity of ordinary citizens of Japan, who could now afford to buy the ivory Hanko seals, prized status symbols with which they signed their letters'. The dominant position of the Japanese in the trade, he says, 'gave them the power to make or break any attempts at an international ban, and it was widely believed by conservationists that the Japanese were unreceptive to global ecological concerns'. However, in this, they write, 'the conservationists were wrong'. They record that '[a] delegation from the Ivory Trade Review Group went to Japan to argue the elephant's case. The Japanese politely listened to the arguments, weighed the evidence and came to the conclusion that they should join the Western nations in the immediate ban pending the next CITES meeting in October, when the whole vexed question of elephants and the ivory trade was due to be debated'.¹⁰⁵⁸

While the Japanese agreement to join the Western nations was to be short-lived; it is significant that it happened at all. The cynic might argue that it was merely a strategic move adopted in Japan's interest; but that it happened does suggest that Japan can be persuaded on occasion to act, apparently, in consort with the Western nations and against its own usual position. This might be a useful insight, given that Japan is usually depicted as being obdurate.

The US and the UK continued to act 'unilaterally'; under growing pressure from environmental NGOs. The Douglas-Hamiltons write that in 1988, 'WWF/USA played a vital role' in pushing the reworked 'Elephant Conservation Act'¹⁰⁵⁹ through Congress. This Act

¹⁰⁵⁴ D H Chadwick *The Fate of the Elephant* (1992) at 147.

¹⁰⁵⁵ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 312.

¹⁰⁵⁶ *Ibid* at 312.

¹⁰⁵⁷ *Ibid* at 316-317.

¹⁰⁵⁸ *Ibid* at 325.

¹⁰⁵⁹ African Elephant Conservation Act' (16 U.S.C. 4201-4245) 1988, as amended. In terms of this Act, a special fund is created to assist African governments with elephant research and conservation; a review of existing elephant conservation programmes in Africa is to be reviewed by the Secretary (of Commerce); the export of raw ivory is prohibited, although the

gave the CITES quota system a limited time to prove itself, after which ‘a total US ban would become mandatory’. The Act banned ivory imports from nations (like Somalia) which had records of illegal ivory trading, and also ‘threatened to ban ivory from all intermediaries’. This, they explain, ‘threw Hong Kong traders into a panic and forced them to freeze all trade with the States to avoid jeopardizing their industry’.¹⁰⁶⁰ Momentum was gathering for a ban. ‘[T]he consensus’, the Douglas-Hamiltons continue, ‘for a world ivory ban was rapidly taking shape’. In May 1989, they then explain, ‘Lord Caithness, the British Minister ... had prompted Margaret Thatcher to halt all ivory exports and imports in the UK. ... France followed Britain’s lead, as did the USA and the whole of the European Community. By mid-June, even Japan had decided to stop imports of worked ivory; ...’.¹⁰⁶¹

Leakey took another step toward involvement. Poole writes that in 1988 Richard Leakey ‘entered the fray, attacking the [M]inistry [of Tourism and Wildlife] for its complacency over the poaching of elephants’; condemning this complacency as ‘economic sabotage’. ‘I couldn’t’, she writes, ‘think of anyone else I knew who would risk his job and perhaps his life to attack the government openly on the ivory issue’. The fight, she records, ‘between Leakey and the [M]inister made the elephant crisis major news overnight, and articles appeared in the local papers day after day’.¹⁰⁶²

Many different organisations and persons have taken, or been given, at least partial credit for proposing the ban. What was needed, however, was that a state member of CITES put the motion forward. According to Kreuter and Simmons, ‘[t]he Humane Society of the United States (HSUS) was the first to call for a trade ban in ivory when it petitioned the United States Fish and Wildlife Service (USFWS), at the beginning of 1989, to formally recommend Appendix I listing for elephants at the 1989 CITES meeting. But USFWS officials were reluctant to comply without the proposal emanating from an African country’.¹⁰⁶³

Politics and special/vested interests began to come to the fore. Arguably, what happened was that Western ideals were increasingly imposed; carried in on a tide of emotion. Bonner writes that ‘[c]onservationists with impeccable scientific credentials who were opposed to a ban were overcome by the public pressure and emotion and concerns about money’; and that ‘[o]rganizations discovered that embracing the elephant and calling for a ban brought in money like no other cause; conversely, organizations that failed to climb on this bandwagon risked losing members’. He explains that ‘[f]acts that rebutted the need for a ban were ignored, such as *growing* elephant populations in some African countries’; and that, above all, ‘Africans were ignored, overwhelmed, manipulated and outmaneuvered - by a conservation crusade led, orchestrated and dominated by white Westerners’. It was all familiar, Bonner concludes, and ‘the latest chapter in the story of conservation in Africa’.¹⁰⁶⁴

import of sport-hunted African elephant trophies is exempted from any moratoria imposed by the Secretary; extensive investigation into elephant conservation and the ivory trade is required, with submission of an annual report; etc. See, for instance, ‘Digest of Federal Resource Laws of Interest to the US Fish and Wildlife Service: African Elephant Conservation Act’ <http://www.fws.gov/laws/lawsdigest/elephnt.html>.

¹⁰⁶⁰ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 318.

¹⁰⁶¹ *Ibid* at 330.

¹⁰⁶² J Poole *Coming of Age with Elephants* (1996) at 201.

¹⁰⁶³ U P Kreuter & R T Simmons ‘Economics, politics and controversy over African elephant conservation’ in M M R

Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 44.

¹⁰⁶⁴ R Bonner *At the Hand of Man: Peril and Hope for Africa’s Wildlife* (1993) at 34-5.

The WWF is a hugely powerful organisation; but it appears to have found itself in a very difficult position. According to Bonner, '[a]s one of the largest conservation organisations, WWF has played a central role in shaping international policy for conserving elephants. It is committed to the principle of sustainable utilization, and it funds programs which encourage African communities to benefit through hunting and the sale of wild animal products. However, the organisation fears that most people donate money for conservation because they want to see animals preserved, not utilized'.¹⁰⁶⁵ 'Even by the beginning of 1989', writes Bonner, 'not one African country was in favour of a ban nor had a single Western country or any of the major conservation groups called for one. At IUCN there was virtually no debate; opposition to a ban was unanimous. ... AWF was the first major conservation organization to actively campaign against buying ivory'.¹⁰⁶⁶ It is interesting to speculate on apparent splits within the 'Western' view. It might even be argued - cynically - that the 'preservationist' view is not *really* the West's line at all - and that what the West *really* wants is sustainable use; as long as *it* controls the use, and decides *what* the use will be.

Some important conservation NGOs found themselves on the back foot. Gavron writes that '[t]he conservation community's support for the idea of sustainable utilization meant that the details of the elephant crisis had been partially suppressed. Now the WWF and other groups were being bypassed. Reporters, magazine writers and television crews were reporting directly from Africa's parks back to the general public'.¹⁰⁶⁷

Lapointe comments on WWF, scathingly, that '[w]hile in appearance, WWF is supportive of sustainable use and supports positive conservation programs around the world; it does not recognize the universality of the principle of sustainable use'. For WWF, he says, 'the notion of sustainable use is fine for certain species, but certainly not for the "charismatic" species such as whales and elephants, which represent a major portion of its income'. In 1989, Lapointe explains, 'WWF completely revised its stance on the proposed ban on ivory trade, purely for financial reasons, and against the advice of its conservation department'. According to Lapointe, '[w]hile the WWF conservation group claimed that a blank[] ban on ivory trade would have a negative impact on the conservation of elephant as a species, mainly in Southern Africa'; its 'financial fund raisers were claiming that, unless WWF shows strong support for the ivory ban, its coffers would suffer'.¹⁰⁶⁸

On the motives of NGOs, Bonner suggests that '[e]lephants had become the environmental fad'.¹⁰⁶⁹ Watson, in a different context, has written that 'Greenpeace exists now only to perpetuate itself'.¹⁰⁷⁰ This is the same basic perception; but from two radically different viewpoints - with Bonner commenting on NGOs; and Watson commenting from within an extreme NGO (the Sea Shepherd Conservation Society) which has itself been accused of being self-serving. Bonner writes that the fact that 'there was a schism as big as a canyon'¹⁰⁷¹ between the approach to conservation taken by the Africans on the one hand and the conservation

¹⁰⁶⁵ R Bonner 'Western Conservation Groups and the Ivory Ban Wagon' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 59 at 62-3.

¹⁰⁶⁶ *Ibid* at 65-6.

¹⁰⁶⁷ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 140-141.

¹⁰⁶⁸ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 38.

¹⁰⁶⁹ R Bonner 'Western Conservation Groups and the Ivory Ban Wagon' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 59 at 66.

¹⁰⁷⁰ P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at xiv.

¹⁰⁷¹ See (n 1462) and 12 generally.

organizations on the other was not surprising, not when one looked at the conservation organizations: they were the monopoly of white Westerners'.¹⁰⁷²

Per Bonner, '[i]n early 1988, it would have been hard to find a conservationist with any zoological background and experience in Africa or with elephants who believed that a ban on the ivory trade was the way to save the African elephant'.¹⁰⁷³ According to Bonner, further, Iain Douglas-Hamilton said [at a November 1998 meeting in Nairobi, of wildlife officials from a dozen African countries] that '[a] proposition for an all-embracing moratorium would ignore the fact that sustainable yield is a reality in parts of Southern Africa, on which a whole policy of conservation and development is based'.¹⁰⁷⁴ Bonner comments, on this, that '[i]f Douglas-Hamilton had ever said publicly, to a television camera, or to an audience in the United States or Europe, what he said at that meeting in Nairobi, the outcome of the ivory ban debate would have been different. He never did. And as many times as I talked to him about the ivory ban, I could never figure out what he really believed'.¹⁰⁷⁵ It is, of course, possible that Douglas-Hamilton doesn't (or didn't) have a definite view. After all, perhaps a definite view is not even realistic - or 'honest'; if one tries genuinely to understand the debate, then one might have to adopt a flexible position and admit exceptions, exemptions, local or regional idiosyncrasies and that compromise is necessary. Leakey, however, writes that 'Iain Douglas-Hamilton ... was a leading proponent of a ban on elephant hunting'.¹⁰⁷⁶

On another protagonist in the debate, Bonner writes that '[John] Hanks, ... who had more than two decades' experience in Africa, thought the ban was bad for the elephant and for Africans'.¹⁰⁷⁷ In partial support of Bonner's view that it would have been hard to find a conservationist supporter for a ban, Leakey writes that '[e]liminating the market seemed such a logical thing to do that I was surprised to discover that the idea was highly controversial. Indeed, until 1988, very few conservation organizations had called for a ban on the ivory trade'. In February of that year, he writes, 'the African Wildlife Foundation (AWF), a Washington, DC-based group, took the lead, launching a "Don't Buy Ivory" campaign and declaring 1988 "The Year of the Elephant"...'. The idea, however, Leakey says, 'wasn't popular with all conservationists or with African governments, which depended on the sale of ivory for income. In fact, until my appointment, Kenya had been against the ban'.¹⁰⁷⁸

5.1.4 East Africa takes a stand

It might surprise some to learn that it was not, in the end, Kenya which proposed the ban on the ivory trade in 1989. Poole offers a reason, writing that '[t]o be considered at the next meeting of CITES, our proposal had to be submitted by a country that was a party to the convention. Our first thought was to ask Kenya to propose the Appendix I listing'. However, '[u]nbeknownst to us', she says, 'Kenya was, at that time, preparing to sell twelve tons of ivory, most of it confiscated from poachers, and it would have been impossible for the country to propose a ban on ivory when at the same time it was intending to sell a huge consignment'. 'We, [advised by Iain Douglas-Hamilton and Costa Mlay, Poole with Jorgen Thomsen of

¹⁰⁷² R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 81.

¹⁰⁷³ *Ibid* at 114.

¹⁰⁷⁴ *Ibid* at 116.

¹⁰⁷⁵ *Ibid* at 117.

¹⁰⁷⁶ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 46.

¹⁰⁷⁷ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 129.

¹⁰⁷⁸ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 85-87.

WWF and his TRAFFIC team]’, she continues, then ‘kept the true nature of our activities a well-guarded secret from all but a few trusted individuals, and we did not relax until the proposal, entitled “Transfer of the African Elephants (*Loxodonta africana*) from Appendix II to Appendix I of [CITES]”, submitted by the United Republic of Tanzania, reached the CITES Secretariat’.¹⁰⁷⁹

She then explains that it was ‘during this same period, April 1989, that Richard Leakey was appointed the new director of WCMD, replacing Perez Olindo’; and that ‘[o]ne of his first decisions in this position was that Kenya would, after all, propose the transfer of the African elephant to Appendix I. In addition, Kenya would not sell its stockpiled ivory’. Once Tanzania and Kenya were behind the ivory ban, she writes, ‘a wave of other countries followed suit, including the [US]. In a bizarre twist, the head of the Wildlife Department of Somalia agreed to propose the Appendix I transfer without the knowledge of those government higher-ups who actively traded in ivory from elephants killed in Kenya’.¹⁰⁸⁰ Little appears to have been straightforward; and we might never know precisely for what reasons important state and other actors acted as they did.

According to Bonner, ‘Leakey’s role in the ivory ban movement was overstated - he did not lead it, as was routinely reported in the West - although the exaggeration probably reflects as much the Western desire for a white hero as it does Leakey’s quest for recognition. Still, he lobbied hard to have the elephant declared an endangered species, and if he had not, it might not have come to pass’.¹⁰⁸¹ A point which needs to be understood *strongly* about international law is that, although it is about states, it is driven by individuals ... which is, of course, why it is important to read and consider their accounts; no matter how self-serving or destructive of others they might sometimes be.

The Douglas-Hamiltons write that ‘[i]t [the burning] was Richard Leakey’s inspired but sad finale to put an end to thousands of years of elephant killing and ivory collecting’.¹⁰⁸² Gavron writes that ‘in May 1989, Costa Mlay and Richard Leakey made the first public call to scrap the CITES controls and ban the entire international trade in ivory. The call was immediately supported by the African Wildlife Foundation in the United States’. ‘At the beginning of June’, he writes, ‘after considerable soul-searching, and the exile of its fiercely “anti-ban” head of African operations to a post in Cape Town, the World Wide Fund for Nature also came out in favour’.¹⁰⁸³

On Kenya’s current position, Western explains that Kenya has shifted its policies since 1989. He is critical of the burning of ivory; arguing that, today at least, it does not serve a useful purpose. He argues also that Kenya’s 1989 burning may have occurred for reasons other than those traditionally put forward - in that there may have been promises from various pro-ban parties of massive compensation for destroying the ivory stockpile. He says that Kenya’s position recently has been to focus on the conditions for sale of ivory. He says that there has been a fundamental switch from the politically driven move of the 1989 burning. He explains

¹⁰⁷⁹ J Poole *Coming of Age with Elephants* (1996) at 222-224.

¹⁰⁸⁰ *Ibid* at 222-224.

¹⁰⁸¹ R Bonner *At the Hand of Man: Peril and Hope for Africa’s Wildlife* (1993) at 133.

¹⁰⁸² I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 332.

¹⁰⁸³ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 141-142. One might speculate on whether it is John Hanks who is being referred to as the person transferred to Cape Town.

that a second consignment was burned, in either 1994 or 1995, largely because Kenya did not know what to do with the ivory and thought that it might prove a temptation to corruption. The position was then made that there ‘had been commitments made’ - to approximately \$50 million - by donors, if Kenya supported a moratorium; but that this commitment was not fulfilled. As a result, therefore, of CITES, Kenya was facing the problem of elephant numbers increasing and conflict increasing. Western tried therefore to focus attention on a new problem as a result of CITES; and, in 1997, proposed that South Africa’s problem also was the (illegal) stockpiles which it would be a waste just to burn. He does, however, advise that burning was a useful goal if it got rid of an illegal stockpile and the money went back into conservation. In 1994/95, he says, we burned to show the donors without expecting a return; rather, not wanting the ivory to become an issue in the trade, the burning was intended to remove temptation and to draw attention to fact that commitments had not been met. This burning was of about 12 tonnes; with the failing donors being the EU and the US, at governmental level.¹⁰⁸⁴

There are some interesting precedents for the burning of the ivory. Lyster writes, in 1985, that ‘[i]n cases where return to the wild is not practicable and where adequate rescue centres are not available, the problem of disposal of Appendix I specimens is particularly serious because re-entry into commercial trade is prohibited’. The problem of disposal, he comments, ‘is equally acute with respect to dead specimens’. In 1979, the US government apparently reported that ‘the value of skins, horns, ivory and other confiscated stock in its possession was approximately US\$2.5 million, that it cost US\$51 000 annually merely to rent storage space for the stock and that some specimens were being stolen’. Conscious, per Lyster, ‘of the expense and security risks involved with such stockpiles and aware of the need to prevent specimens of Appendix I species from re-entering commercial trade’, the New Delhi Conference ‘recommended the establishment of a system of international exchange for non-commercial scientific and educational purposes similar to that recommended for live specimens. This would allow specimens to be sent to other Parties for display in museums or to train enforcement officers in the identification of species’. However, if international exchange ‘should prove not to be practicable’, the New Delhi Conference recommended that Parties ‘save in storage or destroy’ excess stock of Appendix I specimens. The action taken at the Conference, Lyster observes, ‘could be especially significant for valuable items such as rhinoceros horn which it may be preferable to destroy rather than risk theft and consequent re-entry into illegal trade’. He then gives as an example the fact that the ‘government of Bophuthatswana¹⁰⁸⁵ publicly burned its confiscated stock of rhinoceros horns in 1980 in order to ensure that they would not find their way back on to the market’; tells us that in 1981 ‘Switzerland also destroyed a number of confiscated skins’; and tells us further that ‘in 1982 the US government promulgated regulations authorising the destruction of confiscated stock in certain circumstances’.¹⁰⁸⁶

It is worth also mentioning at this point that, subsequent to the high-profile burning of ivory in Nairobi in 1989, there was a burning of Zambia’s stockpile in 1992.¹⁰⁸⁷ This was a publicity

¹⁰⁸⁴ *Personal Communication* Interview with David Western, 8 October 2004, Nairobi: E Couzens. See (n 1087), (n 1125) and (n 1665).

¹⁰⁸⁵ Despite extensive reading, the present writer has not been able to trace another reference to the alleged burning by Bophuthatswana (which was a former, nominally independent, territory within the borders of South Africa).

¹⁰⁸⁶ S Lyster *International Wildlife Law* (1985) at 266-67.

¹⁰⁸⁷ It appears that Zambia burned its stockpile in 1992, on the strength of promises by NGO donors of compensation. Whether these commitments were met or not is in dispute; see Committee I meeting, 12 November 2002, http://www.cites.org/eng/cop/12/rep/Coml_10.pdf. The point I am making here is that the incident is virtually unknown.

gesture that sank without trace, with virtually no apparent impact on conservation principles, and which implies that the Kenyan burning might have been a one-off publicity stunt - arguably the greatest deliberate public relations 'stunt' in environmental history.

Leakey writes that '[i]n early June 1989, Pres. George Bush announced that ivory could no longer be imported into the United States; and a few weeks later, Britain's prime minister Margaret Thatcher followed suit'. This was evidence that 'public opinion was on our side in these countries', but, he says, this was not the case in Africa. He explains that Kenya faced a number of opponents, particularly South Africa, Zimbabwe, and Botswana.¹⁰⁸⁸ He explains further that he understood their argument, but that he had thought they would 'be open to some form of compromise - after all, we were all African countries and it made sense for us to pull together for the good of the continent'. He concludes, however, that it was 'not until I met these men face-to-face did I realize the almost visceral attachment they had to their policies. Nothing and no one was going to change them'.¹⁰⁸⁹ This is an interesting comment, given the perception some have of authorities within SANPARK in South Africa - and particularly within the Kruger National Park hierarchy and culture.¹⁰⁹⁰

Leakey writes also of a meeting of the CITES African Elephant Working Group (a group formed in 1987) in early July of 1989 in Gaborone;¹⁰⁹¹ where he 'thought they made fools of themselves in the meeting when they claimed that Zimbabwe's elephants had an astonishingly high reproductive rate, the females giving birth at nine years of age'.¹⁰⁹² This is the same claim that has been made by the Japanese in respect of minke whales. What is there to be said about the argument? The present writer thinks that scientifically it makes little sense.¹⁰⁹³ The question that might be asked is whether the fact that it is a common argument indicates similarities in the arguments in respect of both species; and therefore similarities in the views of the 'pro-use' protagonists?

As the Douglas-Hamiltons set the scene; '[o]n one side was Eugene Lapointe and his CITES Secretariat, who firmly believed that the best way to save elephants was to maintain the demand for ivory, putting a price on tusks so that producer countries would have an incentive to protect their herds. Behind Lapointe were the Zimbabweans under Rowan Martin, together with South Africa and the other southern states, and the ivory traders of Hong Kong and Japan'. They describe this grouping as 'a curious alliance bound together only by their common interest in propping up a discredited trading system which had made many people rich but failed utterly to protect the elephants'. On the other side, they write, 'were a formidable array of conservation groups from all over the world, backed by Tanzania, Kenya, Chad and Somalia, the US and all of the European Community Nations who wanted an end to the ivory trade once and for all'.¹⁰⁹⁴ The Zimbabweans, he comments, 'seemed happy to write off the rest of the continent north of the Zambezi, where five out of every six African

See (n 1084), (n 1125) and (n 1665).

¹⁰⁸⁸ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 88-91.

¹⁰⁸⁹ *Ibid* at 88-91.

¹⁰⁹⁰ This being the view that the National Parks authorities in South Africa are firmly in favour of the culling of elephants as a means to protect biodiversity. These authorities then appear to be influential in pressing the South African government to argue in favour of relaxing international trade restrictions on the ivory produced by such culling.

¹⁰⁹¹ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 88-91.

¹⁰⁹² *Ibid* at 88-91. Per Leakey, '[t]he Gaborone meeting ended without reaching a consensus ...'. *Ibid* at 88-91.

¹⁰⁹³ See 6.1.7; and (n 1336) and (n 1343).

¹⁰⁹⁴ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 337.

elephants still lived'; and comments that '[c]ulling and trading might work in Zimbabwe, but it was not a policy that could be exported to central Africa or to countries such as Kenya and Tanzania, where men were still dying in the never-ending war against the poachers. Viewed in these terms, such pro-trade attitudes seemed short-sighted and selfish'.¹⁰⁹⁵

On the differences of opinion between Southern and Eastern African range states, Payne writes that 'an intense international controversy had flared up over how to keep African elephants from extinction. The controversy touched on issues of trade, and as a result 111 nations were involved in the decision-making process by 1989'. Scientists, she explains, 'were turning from science to politics in the service of their concerns; researchers who otherwise might have been collaborators were taking sides against one another. Joyce Poole was a spokesperson for the point of view endorsed in East Africa (Kenya, Uganda, Tanzania), which held that African elephants, like Asian elephants, must be designated an endangered species, making all international trade in elephant products illegal'. On the other hand, she says, 'Rowan Martin was a spokesperson for the point of view endorsed in the southern African countries (Zimbabwe, South Africa, Namibia, Botswana, and others), which held that such trade must be encouraged and legal, carefully monitored and policed'.¹⁰⁹⁶

According to Meredith, 'African opinion turned too. Tanzania, after losing 200 000 elephants in ten years, two-thirds of its national herd, became the first African country to support an Appendix I listing. Kenya, under Richard Leakey's guidance, followed suit'. Opposed to this, Southern African countries 'fought tenaciously to prevent a ban'; arguing that their herds were safe, they were expanding, and that they represented a valuable economic resource of benefit to rural communities. There was no reason, they said, 'why southern Africa should be penalised for the failure of other countries to protect their herds'; and that '[p]rovided the trade was carefully monitored and policed, it should be kept open'. According to Meredith, the South Africans took the line that '[i]f the East Africans needed lessons on wildlife management, they would be happy to oblige'.¹⁰⁹⁷

This last comment is potentially ironic, given that the Southern African states have - arguably - been selfish in this regard in recent years, and even sought to undermine one of the best tools (the Lusaka Agreement Task Force)¹⁰⁹⁸ for combating poaching (even though it was in part set up by South Africans).¹⁰⁹⁹

Bonner writes that 'world attention focused on Kenya, but the greatest concentration of elephants in east or southern Africa today is in Botswana - around 56 000, which is double the number of elephants that existed there a decade ago. Zimbabwe's elephant population increased from 30 000 in 1979 to 50 000 today, which is more than double Kenya's elephant population, and Zimbabwe is considerably smaller in area. In South Africa, which has the best-run wildlife department on the continent, the elephant population has remained stable, and poaching has been negligible. These three countries were adamantly against a ban'.¹¹⁰⁰

¹⁰⁹⁵ *Ibid* at 338.

¹⁰⁹⁶ K Payne *Silent Thunder: In the Presence of Elephants* (1999 (1998)) at 194-5.

¹⁰⁹⁷ M Meredith *Africa's Elephant: A Biography* (2001) at 221.

¹⁰⁹⁸ See 13.1.3 and 13.2.1; also (n 2013) and (n 1174).

¹⁰⁹⁹ Donald Kaniaru, however, advised me that the East African countries feel that South Africa has been selfish in not offering support and training to other countries. *Personal communication* Interview with Donald Kaniaru, 30 August 2004, Joensuu, Finland; E Couzens. See (n 1645) and (n 1997).

¹¹⁰⁰ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 91-2.

The figures for the three southern African countries are outdated now, having risen considerably in recent times - the three countries remain firmly opposed to the complete ban on the ivory trade. There also is a point here which should not be understated: that Kenya today no longer has many elephants. It is arguably the Southern African states which are the true range states.

Leakey writes that '[t]he price of ivory did not immediately collapse after we burned the tusks, but there were signs that our message had been heard'.¹¹⁰¹ There was, of course, manipulation of the media from all sides. Leakey tells us that, obviously with the irony intentional, that '[i]n late September 1989, the poachers obliged me, gunning down eleven elephants in the two Tsavos. I held on to the news for a few days, then released it to the press at the beginning of October. ... The story came out just as the CITES meeting was opening'.¹¹⁰²

5.1.5 *The Somali proposal*

Bonner suggests that as the CITES COP approached, the advocates for a total ban faced growing support for an 'accommodation' of the southern African position; which would be achieved by way of a 'split listing'; the elephant populations in Tanzania, Kenya and other countries where poaching was rife going onto Appendix I, and those in Botswana, South Africa and Zimbabwe remaining on Appendix II. This was, comments Bonner, the 'most just and intellectually honest approach'. It was also, he says, the 'legally correct one, since the elephants in those three southern countries were certainly not endangered under international law'.¹¹⁰³ Horrified, he says, 'by the prospect of a continuation of any ivory trading, AWF's Stanley Price came up with an idea'; this being that the elephant would be declared an endangered species, and listed on Appendix I, but that a country could have its population 'downgraded' to Appendix II 'if a panel of experts determined that the country was managing its elephant populations well and controlling the movement of ivory out of the country'.¹¹⁰⁴ Somalia introduced this proposal, and the eventual vote was 76 in favour and 11 against, with four abstentions - one of the abstentions being Japan.¹¹⁰⁵

That it was Somalia, the country which had done so much through its nationals poaching in Kenya's game parks to bring elephant populations in East Africa to their knees, the CITES parties to their impasse, and Kenya to its act of burning, which proposed the compromise 'solution' is, of course, supremely ironic - but such is the nature of international law and politics!

5.1.6 *Southern African disappointment*

Not all was rosy. Bonner points out that '[a]fter all the manipulation, after more than a year of meetings and intense attention paid to the African elephant, the most critical question still had not been answered: Who would provide the money for elephant conservation?'. Whenever, he explains, African governments argued that they needed the money from the sale of ivory in order to fund anti-poaching efforts, the US and the European Community had reassured them.

¹¹⁰¹ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 93.

¹¹⁰² *Ibid* at 117.

¹¹⁰³ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 151.

¹¹⁰⁴ Such selective downgrading was eventually to happen at the CITES COPs in 1997 and 2002.

¹¹⁰⁵ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 157. See (n 1118) below.

However, he comments, when, six months after the COP, ‘seventeen Western governments, all of which had voted in favor of the ban, met in Paris to discuss African elephant conservation’, these donors issued a ‘lofty declaration’ which recognised the ‘importance of the African elephant both as a key species in African ecosystems and the symbol of the maintenance of the continent’s biological diversity’, and also ‘as part of the world heritage’ due to the global importance of the species; but ‘when it came to money to match this soaring rhetoric, to preserve this world heritage, the response was pathetic’.¹¹⁰⁶

Thus the South of Africa found itself ‘subsidising’ the East - and indeed the rest of the world. This must raise important questions about the elephant as a symbol. The importance of the ban in this regard must be questioned; and also the questions of finance, of valuing the environment, and of who should pay for the preservation of ‘world heritage.’

Kreuter and Simmons write that ‘[t]o appease African countries and persuade them to support the trade ban, rather than trust market incentives for protecting elephants, the Western donor community recommended substantial funding for elephant range countries’.¹¹⁰⁷ However, they explain, a recent report concluded that, contrary to these promises, and in a ‘damning indictment of the donor community’ they had, in general, not provided the ‘critically-needed funding promised to these range states at the time of the Appendix I listing of their elephant populations’.¹¹⁰⁸ Comments such as these, according to the authors, imply that ‘while Western preservationists, animal rights proponents, and governments (trying to appease these constituents) are eager to capture the political and economic benefits stemming from the implementation of the ban,’ these interest groups remain ‘unwilling or unable to pay for the direct costs of protecting elephants and the external costs resulting from policies that promote their own objectives’. In economic terms, the conclusion is, these interest groups are ‘free-riding on the existence of elephants at the expense of Africans living with elephants’.¹¹⁰⁹

Again, the argument is that developing range states are subsidising the West; and the argument is compounded by the contention that developed states are not willing to face the real costs of valuing the symbol.

Kreuter and Simmons continue, arguing that, in any case, ‘[e]ven if the ban’s proponents were willing to donate substantial funds to protect elephants, it is unlikely that they could muster sufficient resources to do so’;¹¹¹⁰ and they explain that effective protection of elephants through coercive law enforcement measures is made extremely difficult because approximately half of Africa’s elephants live outside of state protected areas in areas where governments find human activity difficult to control.¹¹¹¹

¹¹⁰⁶ *Ibid* at 158. The US, he says, offered \$2.5 million and France about \$1 million; while Britain said that it had already budgeted £3 million (about \$5 million) for conservation in Africa. ‘If the African countries wanted more for conservation’, Bonner describes the donors’ attitude as being, ‘it would have to be in lieu of money for other development projects’. In other words, he concludes, ‘the burden was again on Africans - if they wanted money for conservation, fine, but that would mean less for schools or roads’. *Ibid* at 158.

¹¹⁰⁷ U P Kreuter & R T Simmons ‘Economics, politics and controversy over African elephant conservation’ in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 50.

¹¹⁰⁸ *Ibid* at 50.

¹¹⁰⁹ *Ibid* at 50.

¹¹¹⁰ *Ibid* at 50-51.

¹¹¹¹ *Ibid* at 50-51.

Bonner writes that Kenya's powerful tour operators are opposed to hunting; fearing that a resumption of hunting will damage the country's image.¹¹¹² Tanzania, he explains, banned hunting in 1973, 'for the same reasons Kenya did a few years later - abuse of the system and corruption - but reinstated it in 1984'.¹¹¹³ Again, what is implied is the value to Kenya of the elephant as a symbol. In Kenya's case, the elephant is considered 'sacrosanct' even though the Appendix I listing would not (in the case of the elephant) prevent hunting from taking place and bringing in revenue - and even though Kenya does have a history of hunting. However, it is also possible (as Bonner does argue) that Kenya stopped hunting for other reasons, and has simply chosen to continue the policy as consistent with its line. It might have chosen differently. At the time of writing of the present thesis, Kenya remains firmly against hunting - with all sport hunting banned.¹¹¹⁴

5.1.7 *Western self-interest*

Sifting through the rhetoric, there are some appalling examples of political self-interest to be found. 'American hunters', according to Bonner, 'feared, with good reason, that if the elephant were declared an endangered species and placed on CITES Appendix I, they would not be able to bring trophy tusks back into the United States, from Zimbabwe or any other place'; and so hunting organizations in the US lobbied against an Appendix I listing. Then, he says, these organisations 'cut a deal with the African Wildlife Foundation and the other groups that wanted a ban on ivory trading: the hunters would not work against the ban, in Washington or with other countries, if the pro-ban people would do nothing to jeopardize sport hunting of elephants'. In effect, he concludes, AWF's position became 'that it was acceptable to kill elephants for sport, but not for the purposes of selling their ivory'; a distinction which Bonner describes as being 'as morally untenable as it is hypocritical'.¹¹¹⁵

This will not be the only place in this thesis where United States' politics, vested interests, and acting in its own interest, coincide - hypocritically. The major Western NGOs do not always come out from under scrutiny favourably either.

Kreuter and Simmons write that '[p]olitically, the voting patterns of the 91 member nations attending the [1989 COP] are revealing'. They explain that 'of the 76 nations endorsing a trade ban only 20% (19) had elephants while 63% (57) were non-African countries'; while, in contrast, 73% (8) of the 11 countries opposed to the ban had elephants.¹¹¹⁶ These statistics, the authors comment, 'emphasize that countries with no elephants (mainly non-African countries) or with rapidly decreasing elephant populations voted to impose an anti-trade policy on

¹¹¹² R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 243.

¹¹¹³ *Ibid* at 245.

¹¹¹⁴ There have been some recent suggestions that the ban might be lifted. See, for instance, the quotes attributed to Julius Kipng'etich, Kenya Wildlife Service Director, in early 2006, at 'Kenyan Official Says Lifting Ban on Sport Hunting Possible' *ENN: Environmental News Network* 16 January 2006 http://www.enn.com/top_stories/article/3472. On the whole, though, it seems that Kenya will adhere to its current policies for at least the foreseeable future. See (n 1012), (n 1014) and (n 1653).

¹¹¹⁵ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 268-9. This is reminiscent of Mackenzie writing that the creation (in Africa and India) of a 'sporting code' in which the 'clean kill' was the prime provision 'was an invention of the late nineteenth century affected [] not so much by developing sensibilities as by improving technology and the transfer of the class relationships of land ruler, land owner, sportsman and poacher to Africa'. J M Mackenzie *The Empire of Nature* (1988) at 302.

¹¹¹⁶ U P Kreuter & R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 45-6.

countries with conservation programs under which elephants populations were stable or increasing'.¹¹¹⁷ Gavron writes of the 1989 COP, however, that '[i]n the end, there was little disagreement' and '[e]ven Japan voted in favour'.¹¹¹⁸

It is significant to note that both the United Kingdom and the United States received exemptions that suited them. The US won the sport trophy exemption it needed to keep its domestic hunting lobby happy; and the UK won a six month exemption for Hong Kong to dispose of its ivory stockpile.¹¹¹⁹ It would be no wonder if range states were to look askance at these two developed countries and question their altruism in the debate over 'saving' the elephant.

Leakey confesses, though, that he did not think that the Appendix I listing 'would actually stop the trade'; explaining that he thought that was 'far more likely to happen from publicity generated by the ivory burning and the ad campaigns that were making ivory taboo. On that score, I was wrong'.¹¹²⁰ Perhaps it *was* the publicity, though, to a large extent - with the Western market for ivory collapsing in its wake.¹¹²¹

5.2 The next CITES COPs - Kyoto, 1992; Fort Lauderdale 1994

5.2.1 The immediate effects

Leakey writes that '[i]t would be some time before we saw any positive effects from the ban'. He describes the southern African countries, 'Zimbabwe in particular', as telling the press that they were 'going to do everything possible to overturn the decision at the next conference in three years, and that they might continue to trade outside the ban with those countries not signatory to the CITES convention'. They continued to argue, he writes, 'that they needed to sell ivory in order to support their national parks, and felt that they were being unfairly punished for successfully managing their elephants'.¹¹²²

This is the argument as to subsidisation by Southern Africa of East Africa. However, nothing in the ivory debate is straightforward and the management by the Southern African countries might not have been as successful as they clearly believed it to be. Leakey continues, writing of mid-1991, that 'Zimbabwe had recently announced that it was going to continue trading ivory, and that announcement immediately revived the illegal market'. The Zimbabweans, according to Leakey, 'always insisted that they sold only ivory culled from elephants in their own parks, but I never believed them - and, obviously, neither did people in the trade. Some poachers were gambling that they could mix their old ivory with that from Zimbabwe, and I didn't think they would make such a bet if they weren't fairly confident of the outcome'. He

¹¹¹⁷ *Ibid* at 45-6.

¹¹¹⁸ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 144. Gavron must mean, however, that Japan did not oppose. See (n 1105).

¹¹¹⁹ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 300.

¹¹²⁰ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 117. Leakey writes that '[a]lmost overnight, the price of ivory collapsed. The day before the meeting, a pound of ivory sold for more than one hundred dollars; the day after, a seller would have been lucky to get five dollars'. *Ibid* at 118.

¹¹²¹ On this contention, generally, see D Harland *Killing Game: International Law and the African Elephant* (1994).

¹¹²² R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 119.

does add, though, that he was ‘was surprised there was any market for ivory at all, since, despite Zimbabwe’s selfish declaration, tusks were being sold for under [\$5] a pound’.¹¹²³

According to Leakey, ‘[t]hanks to both the Appendix I listing and our rangers’ efforts, the ivory trade had slowed to a trickle, but it was still there - the poachers, traders, and buyers were still in place, waiting to make their move. All that was required was some other African country deciding to break the ban’.¹¹²⁴ This does appear to be a trend - implying that there is always a potential for poaching, just below the surface, a potential that can be set off even by half-signals.

Generally, in the years immediately following the 1989 CITES COP, it appeared that the ivory trade had collapsed - there were even reports of further burnings of ivory stockpiles, none of which, of course, had anything like the impact of the 1989 Nairobi burning. The Douglas-Hamiltons wrote in the early nineties that ‘[n]ews from the Far East has been good’; and that ‘Taiwan, once feared as a potential ivory loop-hole country, has twice burnt its ivory’. In 1991, he wrote, ‘except for Japan, the trade was reported as totally collapsed throughout the Far East’.¹¹²⁵ There have been several mentions by commentators of burnings subsequent to the 1989 Nairobi burning - *vide* Zambia’s 1992 burning, and this mention of Taiwan. Details for all of these are, however, elusive; and the Nairobi burning remains the only one that was of major significance.

Hanks writes that ‘in South Africa the gross income from the sale of elephant products over the five year period from 1985 to 1989 averaged US\$1.4 million per year’; and that ‘these funds accrued directly to the National Parks Board, and helped to offset the costs of security and management of the various reserves under their control, notably Kruger National Park’. In June 1991, he records, Botswana, Namibia, Zimbabwe, Zambia and Malawi established the Southern African Centre for Ivory Marketing (SACIM). This, he says, ‘was a proposal to control the legal trade through one central marketing point’, with the bulk of revenue raised apparently going to an ‘elephant conservation fund’. SACIM, however, had, he continues, ‘little influence on the elephant debate at the 8th [CITES COP] in Japan in March 1992, which voted to keep all elephant populations on Appendix I’.¹¹²⁶

Per Leakey, ‘[t]he CITES group was convening again in March 1992, and Zimbabwe was working hard to convince the delegates to remove the elephants from Appendix I so that the ivory trade could resume’;¹¹²⁷ but, he suggests, ‘our security data showed that the ivory traders were simply waiting in the wings for the illegal trade to restart. If the Zimbabweans had their way, Kenya would once again have a poaching war on its hands. Several southern African countries, including South Africa, were allied with Zimbabwe’.¹¹²⁸ This seems still to be roughly the position today.

¹¹²³ *Ibid* at 197.

¹¹²⁴ *Ibid* at 199.

¹¹²⁵ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 345. The description was apparently ‘by Esmond Bradley-Martin who toured the twelve countries’. *Ibid* at 345. On the Zambian burning in 1992, see (n 1084), (n 1087); see also (n 1665).

¹¹²⁶ J Hanks ‘Foreword: A Southern African Opinion’ in D & S Balfour *African Elephants: A Celebration of Majesty* (1997) 22 at 23.

¹¹²⁷ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya’s Elephants* (2001) at 218-9.

¹¹²⁸ *Ibid* at 218-9.

Leakey continues, writing that '[o]ver the next two months I lobbied actively for the elephants. I knew we had to build a strong coalition of supporters because it appeared unlikely that South Africa and Zimbabwe would change their stance'. He does, however, suggest that South Africa and Zimbabwe 'had offered a kind of compromise or at least they were trying to give the appearance of offering one'. This 'compromise' took the form of asking that instead of the ban being lifted in its entirety, 'it be lifted only for those countries that could demonstrate they were managing their elephant populations effectively'.¹¹²⁹

This is the split-listing idea. According to Leakey, South Africa and Zimbabwe 'relied on the money such trades brought, they said, to finance their parks and they were being unfairly punished for a problem - rampant poaching - they did not have. Zimbabwe wanted the elephant down listed altogether, so that it could once again trade ivory'.¹¹³⁰ These positions have apparently changed in the years since 1989.

Leakey makes the point firmly that *any* trade would endanger elephants by encouraging the illegal trade. 'I was', he writes, 'strongly opposed to any compromise. It would place the elephants in every other African country in jeopardy, and it was certain to set off a new round of poaching and on a massive scale'. He then suggests that even if only elephant products other than ivory were to be sold, poachers would speculate by hiding the ivory in hopes of selling it later; and that, if Zimbabwe was allowed to trade, poachers would find ways to sell their illegal ivory through Zimbabwe as had happened while the CITES quota system was in operation. He suggests that in 1992 there 'were already signs that poachers were betting that the trade would begin again. On the black market, the price for ivory had doubled from \$5 to \$10 a pound. And in Japan, just before the CITES meeting opened, officials confiscated twenty-seven ivory tusks from a ship docked at Kobe Harbor'. All of this evidence, Leakey argues, convinced him that the only way to prevent poaching, and 'questionable ivory', was to allow no trade at all - 'ever'. 'I hoped', Leakey explains, that 'I could persuade the other African countries, including those that wanted some form of trade, that a united African stand behind keeping the elephants on Appendix I was best for all'.¹¹³¹

In effect, then, both sides accused the other of selfishness. According to the Southern African countries, they were losing revenue by being forced to compensate for others' inadequacies; according to the East African range states, the Southern African countries were determined to profit, even at the knock-on cost to other states.

Accusations of selfishness and short-sightedness came out. Leakey writes that '[Rowan] Martin's attitude had always irritated me [since] he spoke only of Zimbabwe's needs, not those of Africa as a whole'; and that 'so long as people like Martin represented their countries, we would never be able to develop a pan-African position on the needs and problems of the elephants - or on any other issues for that matter'. My first day, Leakey says, 'in Kyoto was an eye-opener. This was my first CITES meeting; I decided right there and then that it would be my last'. In his opinion, the COP 'seemed to have less to do with conservation than with people building careers or trying to make a name for themselves'.¹¹³² Ironically, of course, the same charge has been made against Leakey himself. What is important about the comment,

¹¹²⁹ *Ibid* at 231.

¹¹³⁰ *Ibid* at 231.

¹¹³¹ *Ibid* at 231.

¹¹³² *Ibid* at 232-3.

though, is the implication that there are always more issues than the elephant - and the rise, perhaps, of regional treaty initiatives. Individual personalities are important.

5.2.2 *The split-listing idea*

Bonner writes that '[t]here was no serious movement at Kyoto to have the African elephant taken off Appendix I'; but that the Southern African nations wanted to have their elephant populations downlisted to Appendix II, which meant they would be allowed to trade in ivory. However, he explains that, as they knew the strength of the opposition to ivory trading, the Southern Africans 'were willing to agree to a moratorium for two years'.¹¹³³

At COP 9 in November 1994, according to Hanks, 'South Africa submitted a proposal to transfer its elephants from Appendix I to Appendix II to trade internationally in non-ivory products - mainly skins from elephants culled for ecological reasons in Kruger [KNP]'. A commitment was made that funds raised would go back to park management. Hanks explains that in the five years leading up to the general Appendix I listing coming into place in 1990, [KNP] had earned US\$340 000 annually from the sale of skins'; and that 'by 1994, 800 elephant skins were stockpiled in the park'. An integral part of South Africa's proposal, he explains, was the commitment that, if the proposal was accepted, the country would withdraw its 'reservation' to the Appendix I listing. The implication of this being that South Africa 'would never again be able to trade in ivory internationally without the approval of CITES'. Those opposed to the South African proposal, however, expressed concern that placing South African elephants on Appendix II, 'even for non-ivory products, would act as a signal for the re-opening of the ivory trade, and would thus stimulate further poaching, although no evidence was brought forward to substantiate this'. Ultimately, though, opposition to the proposal, records Hanks, 'continued in the build up to the CITES [COP], leaving South Africa with little alternative but to withdraw the proposal at the [COP] itself'.¹¹³⁴

D and S Balfour concur with Hanks' assessment, writing that South Africa's 'initial position at the 1994 CITES meeting was to remove its formal objection to the ivory trade ban in return for a downlisting that would allow them to trade in elephant meat, hides and hair, as well as live animals. However, South Africa's delegates withdrew their proposal at the eleventh hour after experiencing the depth and vehemence of opinion against them'. They then explain that somewhat 'detracting from the credibility of the states pushing for a downlisting at the 1994 CITES meeting' was their alliance with Sudan, which country wished to be allowed to market its stockpile of allegedly legal ivory. Their application was, however, 'firmly rejected'. It is worth bearing in mind, write the Balfours, 'that in 1977 the African elephant was put on CITES Appendix II specifically as a means of controlling the illegal ivory trade and drying up the black market in poached tusks'; and, they say, 'that this measure was an abject failure is now recorded history' with CITES and related bodies proving 'to be incapable of regulating the legal trade'. Ultimately, they conclude, there 'can be no guarantees that such a measure could or would succeed'; as 'there are just too many profits to be made on the illegal black

¹¹³³ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 281.

¹¹³⁴ J Hanks 'Foreword: A Southern African Opinion' in D & S Balfour *African Elephants: A Celebration of Majesty* (1997) 22 at 23.

market - by the poachers, the traders, the middlemen and the corrupt officials who in the past found it so easy to issue false documentation certifying the legality of poached ivory'.¹¹³⁵

5.3 CITES and the African Elephant

5.3.1 *Opposition to the Appendix I listing*

In 1989 when the African elephant was placed on Appendix One of CITES, and thus given complete protection from all commercial trade, this was done against opposition by Southern African countries and no provision was made for financial compensation to these countries. In other words, there was no subsidisation and Southern African states acted to their own detriment for the sake of other members of the international community.

Effectively, therefore, the developing (or transitional) countries in Sub-Saharan Africa are subsidising the developed countries in the North. In order to satisfy the current trend in developed countries to stigmatise the use of elephant products, developing countries with well-managed elephant populations are foregoing a potentially lucrative source of revenue. Altruism cannot be said to have played a part. Acting against their own interest in international law is not something that states do easily; and in this case it has led to the Southern African countries harbouring much resentment. The Southern African countries fought hard against the listing on Appendix I, and at every CITES meeting since 1989 have sought a downlisting.

Southern African opposition to a closure of the trade in ivory has always been significant. Kreuter and Simmons write that '[s]ince the East Africans had suffered the greatest losses in elephants during the 1980s, they were effectively seeking a solution to a national problem through the closure of ivory trading everywhere'; but that 'Zimbabwe, ... believed that such a listing would only divert attention from the real underlying cause for the decline of the African elephant, the lack of effective law enforcement'. In response, they suggest, 'to coercive pressure to adopt the listing', Zimbabwe stated that it would not abandon its successful conservation programs 'either to save face for other countries that have failed, or to provide more employment for London and Washington-based conservation ideologues'.¹¹³⁶

Some efforts have been made roughly to quantify the impact of the closure on the Southern African range states. Bonner writes that '[David] Pearce, a professor of economics and director of the Environmental Economics Centre at the University of London, said that by depriving countries of ivory sales, the ban was the equivalent of a \$50 million tax on African governments; in addition, domestic carving industries in African countries would be severely hurt'.¹¹³⁷ While it will never be possible to quantify such impact accurately, this might give some idea of its magnitude.

¹¹³⁵ D & S Balfour *African Elephants: A Celebration of Majesty* (1997) at 36. As the Balfours write, South Africa was 'a country whose military was seen to be heavily involved in elephant poaching not so long ago ...'. *Ibid* at 36. See 13.1.3 and (n 1994).

¹¹³⁶ U P Kreuter and R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 49.

¹¹³⁷ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 142.

Parker argues that '[a]s a mirror reflecting greater spheres in sharp focus, conservationism highlights the developed world dictating to Africa. Conservation policy is still laid down by white men. It comes across crudely when the animal loving organizations in the United States tell Kenya that if sport-hunting is reintroduced, it will campaign against American tourists coming to Kenya'. Just as crude, he suggests, is US support 'for banning the export of Africa's ivory with the proviso that it should not apply to American citizens' taking tusks as sporting trophies'.¹¹³⁸ As discussed, the US clearly acted in its own interest in seeking the closure of the ivory trade (and thereby satisfying its domestic constituency which at the time was expressing revulsion for the trade); but at the same time satisfying the (substantial) pro-hunting lobby within its borders, by obtaining a 'sport trophy' exemption from the trade ban. Is this hypocrisy, or *realpolitik*? Probably it is both. States act in their own interests only - unless compelled to do otherwise.

5.3.2 *The effects of the listing*

Chadwick comments that '[c]ontrary to the southern African group's predictions, the price of elephant teeth did not soar as soon as the commodity became outlawed everywhere. On the contrary, the price plummeted at once and continued to sink by degrees for months afterward. Despite their earlier threats to exercise the right of any nation under CITES to take an exception to the ban and continue exporting ivory, Zimbabwe and South Africa refrained from trading tusks, much to their credit'.¹¹³⁹ Zimbabwe and South Africa are clearly being praised for remaining within the constraints of the international legal system - arguably, however, they had simply decided not to risk the adverse consequences of being seen as ignoring international law, and had resolved privately to regroup and fight again.

Kreuter and Simmons write that the 1989 vote in favor of a ban 'has not only affected the elephant's conservation status but has subverted the CITES treaty. The voting parties were aware that several elephant populations were not endangered but the majority nevertheless voted for Appendix I listing because it was perceived that transfer of only the declining populations might compromise the effectiveness of an ivory-trade ban in reducing poaching'. Their conclusion is that the majority of the voting parties therefore 'wilfully violated the CITES guidelines, thereby denying southern African states (with stable or increasing elephant populations) the protection of the legal instrument they had undertaken to uphold'.¹¹⁴⁰

This is similar to the charge that has been levelled against the anti-whaling parties within the ICRW. The rhetoric is the same. 'Furthermore', suggest the same writers, 'successful imposition of the ivory-trade ban has resulted in organizations, such as the HSUS,¹¹⁴¹ attempting to end the importation of sport-hunted ivory into the US. While, so far [1994], this bid has failed, it is naive to assume that the ivory-trade ban cannot affect consumption-based conservation programs that depend on non-ivory revenue from elephants'.¹¹⁴² This seems unlikely. The pro-hunting lobby within the US - and within the range states - is too powerful.

¹¹³⁸ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 387.

¹¹³⁹ D H Chadwick *The Fate of the Elephant* (1992) at 344.

¹¹⁴⁰ U P Kreuter and R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 46-7.

¹¹⁴¹ The Humane Society of the United States; see <http://www.hsus.org> generally.

¹¹⁴² U P Kreuter and R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 46-7.

Of course, banning of the importation of ivory (and other elephant-related) sport trophies would have the advantage to the US of lending consistency to its position. However, there are radically different domestic views within the US, and the present accommodation of both of its constituencies is probably the ideal situation. Hypocrisy has never, of course, particularly bothered the US - *vide* the accommodation of both of its interest groups in the whaling debate.

Kreuter and Simmons point out, arguing on the basis of illegal trade having occurred in 1993 and 1994, that the listing of the elephant on Appendix I may not have been altogether successful; writing that '[e]vidence that the ivory-ban has caused demand to fall is mixed. Although legal American, European and Japanese ivory consumption was effectively terminated by the trade ban, internationally the demand for ivory has not been eliminated'.¹¹⁴³ The implication being, then, that if not successful the 'harm' which the ban does to the Southern African interests is not outweighed by any benefit.

5.3.3 *The next COP*

It should not be forgotten that, as Chadwick writes, '[a]t the 1992 meeting of CITES held in Kyoto, Japan, in mid-March, five southern African countries - Zimbabwe, South Africa, Botswana, Malawi, and Namibia - lobbied to downlist the African elephant from Appendix I to Appendix II, changing its status from endangered to threatened. Although they agreed not to resume trade in ivory in the near future, they said they wanted to sell hides and meat'. It appears, however, that only two other nations among CITES' 112 members, Japan and Switzerland, supported downlisting; and that once it 'became obvious that their proposal would be soundly rejected', the southern African bloc withdrew it. 'But', per Chadwick, 'they did not agree to abide by the will of the majority. Instead they left threatening to establish trade in elephant products - including ivory - among themselves and the more than fifty nations that are not signatories to CITES and do not abide by international regulations on commerce in wildlife'.¹¹⁴⁴

5.3.4 *Reservations held over elephants*

Interestingly, as at the time of writing, only one country retains a reservation in respect of the CITES Appendix I listing of elephants - this being Malawi.¹¹⁴⁵

5.3.5 *COP 10, 1997*

In June of 1997 the writer was in Harare at the time of the 10th CITES Conference of Parties. It was an interesting place to be, to observe the hysteria and hype that surrounded the issue of resuming trade in elephant products. Approximately 75 proposals to uplist or downlist various species were put forward; however, the main issue in the public eye at the Conference was that of the African elephant and its possible downlisting. The line taken by Southern African countries was fervently in favour of downlisting. Zimbabwean President Robert Mugabe suggested that '[e]lephants, especially because of their huge bodies, consume large amounts of

¹¹⁴³ *Ibid* at 47.

¹¹⁴⁴ D H Chadwick *The Fate of the Elephant* (1992) at 466-7.

¹¹⁴⁵ 'Reservations entered by Parties: in effect from 13 September 2007' at 'Reservations' at http://www.cites.org/eng/app/reserve_index.shtml. Malawi took out the reservation on 18 January 1990. *Ibid*.

[scarce] underground water and, we believe, every species must pay its way to survival'.¹¹⁴⁶ Although somewhat emotional, comments such as this may indicate deep resentments. Zimbabwe certainly felt hard done by and South Africa, Namibia and Botswana took the same line.

Botswana were also in favour of downlisting. Chadwick writes that '[f]or years, Botswana citizens were allowed to hunt elephants under a permit system, much as Americans are entitled to hunt deer, for example'.¹¹⁴⁷ This raises an important question: why is Botswana opposed to culling? Fear of affecting their tourism industry?¹¹⁴⁸ It seems, however, that states do not cull when unable to trade in elephant products. Is it economically unviable; or, more likely, is there simply so strong an association in the minds of conservation officials that culling and economic use of the products have become inseparable?

5.3.6 *Japan, Norway and the downlisting of the elephant*

Norway and Japan supported the Southern African countries, arguing that countries have an inalienable right to the sustainable utilisation of their natural resources. Few other developed countries gave such support, and it is worth considering that Norway and Japan had an agenda other than altruistic concern for the Southern African viewpoint. International trade in endangered species is conducted mainly between developing countries where these species are found, and developed countries, including newly industrialising countries such as China, where the markets for these species are located and their derivative products are destined.¹¹⁴⁹

There is obviously more to be said for a country's right to profit from natural resources found within its borders than for a country's right to utilise resources from the high seas, or 'global commons', against the wishes of other states. However, the principle of sustainable development remains the same and, for the pro-whaling states, downlisting of the elephant would provide a useful precedent.

The present writer has found only a few other writers who have drawn the link between elephant and whaling issues at the 1997 Harare Conference. Kathleen Payne writes in 1998 that 'I started hearing from friends who had attended the CITES meeting. Strange things had happened there, suggesting corruption of the CITES process. In time I put their several stories together into the following: The circumstances of the vote, taken in the last evening of the meeting at the insistence of Japan, Norway, and Zimbabwe, were unusual. For the first time ever in CITES, the voting was secret. The secrecy was in itself a controversial decision, also pressed by the delegates from Japan and Norway'.¹¹⁵⁰ It is, of course, very interesting - if true - that this was the first ever secret ballot; providing another link with the ICRW, where Japan has pushed hard for secret ballots. However, see Reeve below who suggests that it was COP 9 - in 1994 - which saw the 'introduction' of the secret ballot.¹¹⁵¹

¹¹⁴⁶ CITES COP 10 'Opening Speeches: Address by the President of the Republic of Zimbabwe, Cde R G Mugabe' http://www.cites.org/eng/cop/10/E10_open.pdf.

¹¹⁴⁷ D H Chadwick *The Fate of the Elephant* (1992) at 416-7.

¹¹⁴⁸ This is the explanation I was given, unofficially, by Botswana Wildlife Service officials and safari guides in Botswana in June 2002. See (n 1623) and (n 2220).

¹¹⁴⁹ D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 297.

¹¹⁵⁰ K Payne *Silent Thunder: In the Presence of Elephants* (1999) at 270-1.

¹¹⁵¹ See 5.3.7 and (n 1290).

Darby has suggested that Japan and Norway ‘restrained themselves’ for years from using their lodged objections and ‘taking a fight from the IWC into another organisation’ - he suggests also, however, that the two countries have tried ‘repeatedly’ to have minke stocks downlisted for trade, which seems on the contradictory side.¹¹⁵²

‘The outcome of the vote’, writes Payne, ‘surprised many participants, suggesting that under the cover of secrecy some representatives had cast their votes contrary to their openly stated positions and to their mandates from their home constituencies. This apparently allowed several countries with no elephants and no trade in or industry using ivory - Norway, for instance, and a group of Caribbean states that receive the benefit of Japanese “development aid” programs for fisheries - to support resumption of the ivory trade’.¹¹⁵³ This would indeed be an interesting voting bloc - and a clear example of the linkage of the ICRW with CITES, and more specifically of the elephant with the whale. ‘In what seemed to be a reciprocal action’, continues Payne, ‘several southern African nations with no trade in or industry using whale products then supported Japan in trying (again by secret vote) to reverse the protected status of the northeast Atlantic population of minke whales’.¹¹⁵⁴ The status of whales, she continues, ‘is initially determined by the International Whaling Commission; after the CITES meeting, Japan and Norway tried to introduce secret voting there too’.

‘Japan, Norway, and Zimbabwe’, Payne goes on, ‘have made many attempts to legalize the exploitation of endangered species in the past, but on this occasion they had unprecedented success in gaining allies. The political collusion has created a dangerous situation for both whales and elephants. My informants speculated that this new development was made possible by the secret vote’.¹¹⁵⁵ As will be seen later in this thesis, different perspectives on democracy and transparency complicate the finding of common ground at wildlife-related conventions.¹¹⁵⁶

Payne does err, however, when she continues; writing that ‘I suppose that [CITES] and the [IWC] were founded as mechanisms to curb the greed and dishonesty of individual nations, and that the founders are now rolling over in their graves’.¹¹⁵⁷ Both treaties were originally as much trade as conservation treaties and if their founders are rolling over in their graves it is as likely to be because of modern attempts to utilise the treaties as *conservation* (‘preservation’) instruments.

Friedheim, writing in the context of whaling, suggests that ‘[a]s important a test as whaling is of the viability of multilaterally established rules, what is happening within the IWC is only one example of a more general revolt against dominant powers imposing their will on others’. He then makes specific reference to CITES; writing that [at COP 10 in Harare] ‘three African states that have managed their elephant herds but were banned from selling ivory from culled animals to help pay for their efforts argued and successfully lobbied to overturn the rigid ban on international ivory sales’. The conclusion he draws from this is that ‘[p]erhaps the partial accommodation of the needs of these states is a sign that those in control of international resource management issues have become more sophisticated in their approach and can take

¹¹⁵² A Darby *Harpoon: Into the heart of whaling* (2007) at 187.

¹¹⁵³ K Payne *Silent Thunder: In the Presence of Elephants* (1999) at 270-1.

¹¹⁵⁴ In fact, it was Norway’s proposal which was put forward first. See 6.1.4.

¹¹⁵⁵ K Payne *Silent Thunder: In the Presence of Elephants* (1999) at 270-1.

¹¹⁵⁶ See 16 on membership of the IWC.

¹¹⁵⁷ K Payne *Silent Thunder: In the Presence of Elephants* (1999) at 271.

care of local needs and sensibilities, and this is a sign that a serious threat to global environmental governance can be avoided. One hopes so, but the jury is still out'.¹¹⁵⁸

Again, this shows linkage of the two species as symbols: the one as precedent for the other; and together forming a battleground on which the meaning of 'conservation' might be determined.

Of other commentators, Vogler does suggest that '[a]t the 1997 Meeting of the Parties in Harare the conflict within the IWC spilled over into CITES as Norway and Japan sought to weaken the whaling moratorium by proposing the "downlisting" of certain whales from Appendix I. If the move had been successful ..., it would not only have legalized trade in whale products but would have had clearly detrimental implications for the authority of the IWC'.¹¹⁵⁹ Pickover writes that '[o]ver the years CITES controversies about elephants have divided the members down the middle and almost threatened the existence of CITES itself. At the heart of these controversies have been the southern African nations which, with Japan and Norway, are the main proponents of the "wise use" doctrine'. She then explains that in 1997 Japan and Zimbabwe in particular mounted a very successful propaganda campaign to convince the world's media that the ban was essentially an 'anti-African plot from Western elitists who did not understand the need for ivory to bring in cash to pay for conservation and social services'; concluding that 'there also appears to have been a trade-off between the Norwegians and certain African countries in the form of 'we will let you kill elephants if you will let us kill whales'.¹¹⁶⁰

How deliberate a strategy this may have been, and how deliberate the cooperation, will probably never be known. In the run-up to the Harare COP, however, Greenpeace certainly appeared to believe that a conspiracy was afoot.¹¹⁶¹ According to Greenpeace, at the Harare conference, South Africa proposed to change the annotation to allow trade in rhino horn. 'The

¹¹⁵⁸ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 19-20.

¹¹⁵⁹ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 52-53.

¹¹⁶⁰ M Pickover *Animal Rights in South Africa* (2005) at 74-76.

¹¹⁶¹ Worth quoting at length, the NGO alleged that:

[s]ix countries are taking the lead in the assault on CITES: Japan, Norway, Botswana, Canada, Namibia and Zimbabwe. They have formed an alliance and worked out detailed plans to change CITES from a conservation convention into a wildlife trade one. In January the German weekly *Der Spiegel* published leaked material showing that a government representative from Zimbabwe was working secretly with other ivory-producing states in Southern Africa to weaken CITES. Their main target is CITES's principle of suspending trade when a population is depleted. Instead, they want trade to be allowed even for endangered populations. The governments of the ivory cartel, the Southern African Centre for Ivory Marketing (SACIM), knew that no one would accept such a proposal from them and so began to look for another nation to put forward their proposal. "It required a Western nation or a neutral party to put forward the proposals," the leaked report observes. In late 1993, the ivory-producing states "began lobbying internationally and in the strictest secrecy for the revision of the treaty." A "senior European delegate" helpfully suggested that "the best way to achieve the changes to the treaty would be to follow a two-stage process, with the first stage being an evaluation of the present treaty." The Canadian government obliged the ivory-producing nations by officially proposing at the Conference of Parties in 1994 a review of CITES's effectiveness, which was expected to lead to the desired weakening of the Convention. That review has been completed. The Southern African states were frustrated when the majority of CITES members expressed their opinion that the treaty was effective. The conclusions will be discussed in Harare, where it will be seen whether this strategy to weaken CITES will work. Greenpeace 'The Pro-trade Syndicate at CITES: Its secret names and tactics'

Greenpeace International Media Briefing Paper <http://archive.greenpeace.org/comms/97/bio/citesbrief.html> (accessed 29 July 2006). According to Greenpeace, these details had been gleaned from a leaked memorandum after the 1994 COP. *Ibid.* According to Greenpeace, '[t]he pro-trade nations' approach to the ivory issue can be gathered from a leaked memo in which Jon Hutton (ART, CAN, CITES Animals Committee) describes the 1994 Conference of Parties'. The present writer did attempt to find out more about this on a visit to ART in Cambridge - ART has now disappeared, replaced by the World Conservation Monitoring Committee (WCMC) which works closely with the IUCN - but Jon Hutton was not in Cambridge in February 2007.

Southern African elephant states’, said the NGO, ‘have proposed downlisting of their elephant populations for limited trade in ivory, hides and live animals, but their strategy is to ensure that, at a minimum, they will be allowed to downlist elephants for live trade, as a courtesy to Zimbabwe for hosting the meeting’. Greenpeace then added that ‘[t]he other important downlisting proposal to be discussed in Harare is on whales’ and that ‘[t]he wording of the documents, submitted by Japan and Norway, leaves little doubt that theirs is a concerted effort, which is part of a wider campaign for the reopening of whaling’. This, the NGO concluded, ‘could allow the whalers to copy the would-be ivory exporters: at a minimum downlisting with zero quotas now, followed by attempts at increasing these at the next CITES conference’.¹¹⁶²

In Harare in 1997 South Africa proposed a compromise arrangement, which was initially turned down by the CITES COP. However, out of this refusal came the formation of an inter-governmental working group which put forward amended proposals. Put to a secret ballot, these proposals were adopted with the necessary two-thirds majority.¹¹⁶³ The elephant was not downlisted worldwide, but a ‘once-off’ test auction of ivory was approved. The sale was to be in the total amount of 59.1 tonnes (of a combined stockpile of more than 150 tonnes), from the three countries; to be sold only to Japan; to be used only for the purpose of the manufacture of *hanko* (personal seals); and to take place only after a 21-month moratorium; and after an assessment by a monitoring/investigating committee that was to be set up. This committee was to be called MIKE - “Monitoring Illegal Killing of Elephants”.

5.3.7 *The ballot issue*

Reeve tells us of CITES that ‘[u]ntil 1994, voting at COP meetings on proposals to amend the Appendices and on COP resolutions was always by a show of hands. But at COP9 an option for a secret ballot was introduced, despite objections by parties concerned about the resultant loss of transparency’. Although the rules state that ‘it shall not normally be used’, she continues, in practice the secret ballot is becoming the norm for votes on controversial amendment proposals. At COP10 it was used ‘relatively frequently’, and ‘at COP11 most of the votes on strongly contested proposals, such as those concerning whales, sharks and the hawksbill turtle, were by secret ballot’.¹¹⁶⁴

Reeve then argues that ‘[f]ollowing COP10, held in Harare, Zimbabwe, in 1997, many observers complained about attempts to limit their participation in the meeting’. She explains that NGOs complained about being given inadequate seating space and about being ‘severely restricted in their ability to participate and to make interventions’. Even parties, she says, were restricted, ‘in particular in their ability to comment on draft conditions drawn up by a working group to enable the sale of ivory to Japan from Botswana, Namibia and Zimbabwe (the host country)’. Israel, according to Reeve, later pointed out that ‘the restriction of observers’ rights to participate contravened the Convention and that the conduct of the meeting violated the rules of procedure’.¹¹⁶⁵

¹¹⁶² *Ibid.*

¹¹⁶³ J Gowans ‘Africa’s View Prevails’ (1997) 51:4 *African Wildlife* at 14.

¹¹⁶⁴ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 42-43.

¹¹⁶⁵ *Ibid* at 39-40.

This must be compared to the Japanese view that an open ballot is ‘undemocratic’ because parties can be intimidated by NGOs if they declare a stance publicly. One must wonder whether this is symptomatic of a deep gulf in understanding between ‘East’ and ‘West’. Or at least, between Japan and the anti-whaling bloc in the IWC.¹¹⁶⁶

5.3.8 *CITES and flexibility*

As well as the Secretariat’s possibly exceeding its mandate in respect of taking active enforcement steps, CITES has shown itself to have some flexibility. Per Reeve, ‘[a]lthough there is no reference to a quota system in the Convention, the setting of export quotas, initially introduced as exceptional measures for leopard skins and African elephant ivory, has evolved to become standard practice’.¹¹⁶⁷ Ultimately, of course, parties can do whatever they like - as long as enough of them agree, and if they are sufficiently powerful.

5.3.9 *The limited downlisting and its effects*

Many of the restrictions which were put in place, and conditions which had to be met, were glossed over in media reports, however, and the word appears to have gone out immediately that restrictions had been lifted. A few months later, while working in a safari lodge in the Lower Zambezi National Park, Zambia,¹¹⁶⁸ the writer was informed that poaching of elephants had increased in that country almost immediately after the CITES Conference had ended.

Meredith comments that ‘[t]he role of the ivory trade ... remains unresolved’. Each year, he says, ‘as ivory stockpiles mount, the countries of southern Africa campaign for an end to the ban on international trade, arguing that it deprives them of revenues needed to protect their national parks and wildlife reserves; Zimbabwe, with an elephant population of more than 80 000, leads the field. Other African countries resist the move, claiming that any relaxation of the ban would drive up the price of ivory and encourage poaching’.¹¹⁶⁹ The pressure is becoming greater all the time; and Meredith tells us that ‘[t]he clamour for approval to sell ivory stockpiles meanwhile increases - and not only from southern Africa. Each year, most countries in eastern and southern Africa add at least one ton and in some cases five tons to their stockpiles; Zimbabwe accumulates about ten tons each year. As pressure grows for a change to the rules, the ban, in its present form, is unlikely to remain in place’.¹¹⁷⁰

Hence, perhaps, the possible Tanzanian switch in recent years - from having proposed the ban in 1989 to wanting to trade its stockpile and proposing to CITES that it should be allowed to do so; although in 2007 this proposal was withdrawn before the COP.¹¹⁷¹

In 1999 the proposed auction of ivory (by Botswana, Namibia and Zimbabwe) did in fact go ahead, despite no proper report having been put forward by MIKE and despite evidence that poaching had in fact increased. It seems, though, that the auction itself was successful - well handled as a showcase, the ivory was correctly sealed and dye-marked. An amount of

¹¹⁶⁶ See 16.

¹¹⁶⁷ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 36.

¹¹⁶⁸ Chiawa Camp in the Lower Zambezi National Park, Zambia; www.chiawacamp.zn.

¹¹⁶⁹ M Meredith *Africa’s Elephant: A Biography* (2001) at 224-5.

¹¹⁷⁰ *Ibid* at 225.

¹¹⁷¹ See 5.3.12, 5.3.20, (n 1196), (n 1636) and (n 1655).

approximately US\$5-million was apparently received from the auction, a substantial amount of which is supposed to be earmarked for elephant conservation.¹¹⁷²

The ‘once-off’ sales took place in April 1999. The sale took place in somewhat controversial circumstances. The charge has been made that the conditions laid down ‘were badly drafted and ambiguous, and had been agreed in questionable circumstances’.¹¹⁷³ According to Reeve, ‘in February 1999 ... All countries except Botswana, with respect to its ivory recording system, were given a clean bill of health’. It had been one of the requirements for the auction sale to go ahead that the states involved join the Lusaka Agreement.¹¹⁷⁴ Reeve records that ‘[n]one of the three range states had joined the Lusaka Agreement, though Botswana did state it was considering whether to become a signatory. Instead, they offered as evidence of compliance ... their involvement in the development of a draft protocol on cooperation in wildlife management under the ... (SADC),¹¹⁷⁵ together with their engagement in bilateral agreements establishing joint commissions with neighbouring countries on defence and security’. The Secretariat, says Reeve, however, ‘verified this as adequate to comply with the condition’. Not all agreed with this decision. Eight African range states apparently ‘raised serious concerns about compliance with the conditions in Decision 10.1 in a letter to the Standing Committee’. In addition to considering that ‘condition (e) [joining a mechanism such as the Lusaka Agreement] had not been complied with, they raised several concerns about the system being developed under the auspices of the Secretariat to monitor illegal elephant hunting, ... dubbed MIKE’.¹¹⁷⁶

One ‘clarification’ made was that ‘implementation of MIKE was not necessary for the ivory sales to go ahead.’ Instead, a temporary mechanism was agreed to, which would allow trade to be stopped if it should happen that information from national reporting indicated an ‘important increase’ in illegal hunting or trade, (however, the phrase ‘important increase’ was not defined). Another ‘clarification’ made was that the Lusaka Agreement was considered to be not the only mechanism; but just ‘an example’ of such a mechanism.¹¹⁷⁷ This ‘intensive monitoring of the ivory sales through on-site verification’ was, writes Reeve, ‘unprecedented in CITES history’; and ‘clearly, the reason was the intense controversy surrounding the auctions’.¹¹⁷⁸

It is strange, after all of this, to consider that the mere non-reporting of trade in South East Asia could prevent the 2004 sale from going ahead - as was to happen.¹¹⁷⁹

5.3.10 COP 11, 2000

¹¹⁷² Report of 42nd Meeting of CITES Standing Committee, Lisbon, 28 September 1999, Doc. SC. 42.10.2.1

¹¹⁷³ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 77-80.

¹¹⁷⁴ Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, 1992; see Lusaka Agreement website at <http://www.lusakaagreement.org/about-us.html> (accessed 4 June 2008). See 13.1.3, 13.2.1, (n 1098) and (n 1201).

¹¹⁷⁵ This draft protocol was eventually to become the 1999 Protocol on Wildlife Conservation and Law Enforcement <http://www.sadc.int/english/documents/legal/protocols/wildlife.php>. See 13.2.2.

¹¹⁷⁶ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 77-80.

¹¹⁷⁷ *Ibid* at 77-80.

¹¹⁷⁸ *Ibid* at 77-80.

¹¹⁷⁹ See 5.3.13 and (n 1201).

At the CITES 2000 Conference of Parties (COP 11) in Nairobi, Kenya, the issue was debated and a decision was taken on downlisting of the elephant. The South African elephant population was downlisted from Appendix I to Appendix II, on condition that no international trade would take place until after COP 12 (due to be held in Santiago, Chile in November 2002) - the wording being that a 'zero export quota for raw ivory' was put in place.¹¹⁸⁰

At COP 9 in 1994, South Africa had in fact already managed to achieve the downlisting to Appendix II of the South African population of the southern white rhinoceros, subject to an annotation which allowed only for the international trade in live animals to appropriate and acceptable destinations, and for hunting trophies. Trade in rhinoceros horn is a different issue, of course.¹¹⁸¹ Reeve comments that '[a] common mistake is to assume that experience in the trade in one species can be applied indiscriminately to others. Species are unique. Biological parameters such as growth and recruitment rates, habitat requirements and ability to breed in captivity vary enormously, as do market conditions such as prices and demand. Circumstances affecting trade controls such as the ability to identify specimens are also variable between different species'.¹¹⁸² Species are unique, and Reeve is correct in this - but species are also necessarily linked. One cannot treat species in isolation.

There is virtually no market in Norway for ivory, and ultimately the trade in ivory cannot be seen as being in itself of crucial economic importance in Japan's eyes either. Japan has endured the loss of supplies of ivory since 1989. The quantities of ivory which Japan is going to import legally under CITES supervised arrangements are not of great significance. The present writer would like to suggest, however, that African elephant remains of importance to Japan as a symbol and as a precedent in international law.

In many ways the ivory trade is symbolic of conflicting interests that are the subject of much controversy at meetings of the CITES Conference of Parties. 'The controversy surrounding the issue of the upgrading of the African elephant [in 1989] was merely a harbinger', suggests Ong, 'for 'a wider and even more acrimonious debate over the appropriate environmental conservation paradigm to be employed by the CITES regime for the future - sustainable use or preservation of species'. Within this wider debate, Ong argues, 'the southern African elephant range states and Zimbabwe especially have emerged as the leading proponents of the sustainable use paradigm, which emphasises the goal of using living resources to meet both human and ecological needs, and asserts that in many cases wildlife can best be conserved by exploiting it for economic gain'.¹¹⁸³

According to Reeve, MIKE was again criticised at COP11, with the criticism being 'spearheaded' by Kenya and India. Describing the system as 'an academic exercise to collect

¹¹⁸⁰ 'Outcome of the 11th Meeting of the Conference of the Parties to CITES'

<http://www.cites.org/eng/cop/11/outcome.shtml>.

¹¹⁸¹ Trade in rhinoceros products is not susceptible to the same degree of Western consumer pressure as is ivory. The ban on elephant products was successful largely because it was supported by the United States and Europe, which had both previously been large consumers. Rhinoceros horn has never been a popular trade product in the West, however. Its market has always been in the East (particularly in Taiwan, China and Yemen) and the demand has not been curtailed by the CITES ban on trade. See R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 52. See also, generally, D Harland *Killing Game: International Law and the African Elephant* (1994). See (n 364).

¹¹⁸² R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 14-15.

¹¹⁸³ D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 300.

population data', the two states 'attempted to shelve the MIKE programme', and to 'replace it with range state reporting and introduce a provision to fund improved enforcement capacity in elephant range states'. The effort largely failed, however. The suggested amendments were vigorously opposed by states wanting to trade ivory; and also by the Secretariat, which stated categorically that it did not support the Kenya/India proposals'.¹¹⁸⁴ The role of Kenya and India comes through strongly again and again: the two countries appear to be leading the range states opposed to resuming trade in ivory.

Reeve continues, writing that on its website, the Secretariat justifies ETIS and MIKE as follows: '[m]uch is at stake when trade controls for elephants are debated within CITES. The polarity of opinion among the parties on the subject, together with associated passions, has threatened to skew the working of the Convention in practice and challenged the basis on which it operates'.¹¹⁸⁵ This is a neat quote illustrating the importance to CITES and conservation generally of the elephant.

'Elephants', contends Reeve, 'may be the Convention's "flagship" species and are undeniably "special", but thousands of other listed species receive comparatively next to no attention - or funds. And spending such a disproportionate sum on the verification and monitoring of two species (though the Asian elephant has yet to benefit), without even attempting to raise equivalent funds for preventive anti-poaching measures, detracts from other crucial cross-cutting issues, such as improving the capacity for enforcement of CITES at national level'.¹¹⁸⁶ It might, in fact, not then be a good thing that so much attention is given to the elephant - at the same time, this illustrates the crucial importance to conservation globally of the species. If the elephant is a battleground for conservation, and more resources are to be sunk into its conservation than into the conservation of other species, then it is of huge importance that the optimal result be achieved. In this way, the 'lesser' species might ultimately benefit.

5.3.11 CITES COP 12, 2002

In November 2002 CITES COP 12 was held in Santiago, Chile. Southern African countries launched another assault on the effective ivory trade ban. Zimbabwe did not receive permission for another auction sale, but South Africa, Namibia and Botswana successfully proposed amendments to the annotation to the elephant's Appendix II downlisting. South Africa gained the right to sell most (27 971 kg) of its current stockpile (32 113 kg) held in the Kruger National Park. The decision provided for a 'one-off purchase for non-commercial purposes of government stocks declared by African elephant range States to the CITES Secretariat within the 90-day period before the transfer to Appendix II of certain populations of the African elephant takes place'.¹¹⁸⁷

¹¹⁸⁴ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 83-85.

¹¹⁸⁵ *Ibid* at 87-88. On ETIS and MIKE, see [5.3.23](#).

¹¹⁸⁶ *Ibid* at 87-88.

¹¹⁸⁷ Resolution 10.2 CITES COP 12, 'Elephants - conditions for the disposal of ivory stocks and generating resources for conservation in African elephant range States' <http://www.cites.org/eng/decis/valid12/10-02.shtml>. Resolution 10.2, CITES COP 12, states that:

... (a) The African elephant range States recognise: i) the threats that stockpiles pose to sustainable legal trade; ii) that stockpiles are a vital economic resource for them; iii) that various funding commitments were made by donor countries and agencies to offset the loss of assets in the interests of unifying these States regarding the inclusion of African elephant populations in Appendix I; iv) the significance of channelling such assets from ivory into improving conservation and community-based conservation and development programmes; v) the failure of donors to fund elephant conservation action plans drawn up by the range States at the urging of donor countries and conservation organisations; ...

South African National Parks (SANParks), supported by the Department of Environmental Affairs and Tourism (DEAT), argues that gradual reductions in South African government funding of SANParks has ‘left the organisation suffering from budgetary deficiencies which could be considerably redressed should the current legal stockpile of ivory be sold’. ‘Revenues’, claim SANParks and DEAT, ‘would be used in the interest of elephant conservation’.¹¹⁸⁸

The South African proposal suggested that the sale of ivory be ‘subjected to conditions similar to those applied to the governments of Botswana, Namibia and Zimbabwe decided at COP 10’.¹¹⁸⁹ These conditions included strictures such as that whole tusks (marked and registered) only will be exported; that confiscated ivory (or ivory of unknown origin) will not be exported; that only countries meeting certain conditions (as set by CITES) will be eligible to purchase ivory; that the export of ivory will take place through a single government-controlled centre; and that all net revenues from the sale of ivory will be used for projects that promote the conservation of elephants.¹¹⁹⁰ The eventual approval of the proposal included the stricture that the ivory stocks declared should be marked in accordance with the ivory marking system approved at COP 10 - and that an independent audit of declared stocks should be undertaken under the auspices of TRAFFIC International, in cooperation with the CITES Secretariat.¹¹⁹¹

South Africa proposed also that the 1994 annotation to the Appendix II listing of the white rhinoceros be altered, to allow for the legal trade in all rhinoceros products - the amendment to be made subject to an initial zero quota.¹¹⁹² This proposal was not persisted in at COP 12, however. The current South African approach to sustainable use of natural resources can be seen in the following extract from the SANParks/DEAT Draft Proposal: ‘[t]he ban on all international trade in rhinoceros products introduced in 1977 has failed to provide significant protection to rhinoceros populations in the wild. In fact, such a ban may even be counter-productive in that it prevents the full benefits of wise use of the resource accruing to rhinoceros owners, while rewarding the illegal operators and possibly stimulating poaching as the availability of the resource decreases’.¹¹⁹³ Although taken from a draft document only, this provides an important example of South African government thinking on conservation; with a sustainable use philosophy coming through very clearly.¹¹⁹⁴

5.3.12 Ivory and changing attitudes

It was reported that ‘[i]n Committee I ... Botswana, Namibia, South Africa, Zambia and Zimbabwe presented revisions to the amendment of their proposals regarding the African elephant’. The countries apparently ‘highlighted that requests for annual quotas had been removed’, and that trade in registered raw ivory would be allowed only after a number of conditions; these conditions including verification of prospective importing countries by the

¹¹⁸⁸ ‘Elephants - control of internal ivory trade’ http://www.cites.org/eng/decis/valid12/12-36_39.shtml.

¹¹⁸⁹ Draft Proposal 2, CITES COP 12, DEAT Workshop, Pretoria, 15 March 2002. The present writer attended this workshop.

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ *Ibid.*

¹¹⁹² Resolution 10.2 CITES COP 12, ‘Elephants - conditions for the disposal of ivory stocks and generating resources for conservation in African elephant range States’ <http://www.cites.org/eng/decis/valid12/10-02.shtml>.

¹¹⁹³ Draft Proposal 3, CITES COP 12, DEAT Workshop, Pretoria, 15 March 2002. The present writer attended this workshop.

¹¹⁹⁴ *Ibid.*

¹¹⁹⁴ See 13.1.

Secretariat; reporting by MIKE on established baseline information; and agreement in the Standing Committee that all conditions had been met. Revisions for non-ivory products included trade allowance in live animals for ‘*in situ* conservation programmes’, rather than for ‘re-introduction’ - and in leather goods only ‘for non-commercial purposes’. In response, Germany indicated that it ‘would review funding support for MIKE if the elephant proposals were accepted’. Botswana’s proposal was, however, accepted through a secret ballot, with 59 in favor, 26 against and 21 abstentions. Supporting Namibia’s proposal, Cuba emphasised the importance of sustainable management of their resources by developing countries. Kenya expressed concern regarding poaching by Angola. In a secret ballot, then, Namibia’s proposal passed with 65 in favor, 28 against and 22 abstentions. Botswana, Qatar, Cuba, Namibia, Cameroon, Tanzania and Zimbabwe supported South Africa’s proposal; and this proposal passed (again by secret ballot), with 65 in favor, 24 against, and 10 abstentions’.¹¹⁹⁵

The significance can hardly be understated of the fact that Tanzania voted in favour of this proposal. Tanzania, after all, was the original proposer of the contentious Appendix I listing in 1989. For the country to break ranks at CITES with Kenya and India on the African elephant is, at least to the mind of the present writer, one of the clearest possible indications that the trend worldwide is toward sustainable use of natural resources - and that the ivory trade, albeit heavily restricted, will reopen within years soon to come.

A move of potentially huge significance occurred later in 2003 also, when it was reported that ‘Tanzania had since indicated that it ... would like to sell off some of its 80 000 kg ivory stockpile’.¹¹⁹⁶ As will be seen later, in 2007 Tanzania even made such a proposal formally to the CITES COP - before withdrawing it in the run-up to the COP itself. Despite the withdrawal, it is strongly arguable that Tanzania’s change in policy is a significant indicator of the sustainable use doctrine coming to the fore.¹¹⁹⁷

As was reported in the media, ‘South Africa, Botswana, Zambia, Tanzania, Antigua and Barbuda, and Cuba supported Zimbabwe’s proposal’ while ‘Kenya and the US raised concerns regarding its current ability to adequately enforce laws, manage wildlife, and control the domestic ivory trade’. The proposal was, in the end, when voted on in a secret ballot, rejected with 60 in favor, 45 against, and ten abstentions. When it introduced its own proposal, Zambia explained that it lacked financial support and that it needed ivory sales to raise revenue. Malawi, Cuba, Japan, Antigua and Barbuda and others supported the proposal. The US, however, stated that in its view Zambia’s elephant population fails to meet downlisting criteria; and, with Kenya, the US noted that Zambia’s elephant population had declined. Kenya and the EU then raised ‘deficiencies’ in the monitoring of illegal poaching. The proposal was rejected (again per secret ballot), with 57 votes in favor, 54 against and seven abstentions. Stating that they did not wish ‘to target Zimbabwe’, India and Kenya withdrew their joint proposal on uplisting the African elephants to Appendix I (Prop.12.11).¹¹⁹⁸ The

¹¹⁹⁵ International Institute for Sustainable Development ‘CITES COP-12 Highlights’ *Earth Negotiations Bulletin* 13 November 2002 <http://www.iisd.ca/download/asc/enb2127e.txt> (accessed 29 July 2006).

¹¹⁹⁶ C Mkoka ‘Wildlife officials brace for 2004 ivory sale’ *Earthyear Mail & Guardian online* http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=33244. See 5.3.12, 5.3.20, (n 1171), (n 1636) and (n 1655).

¹¹⁹⁷ See 5.3.20.

¹¹⁹⁸ International Institute for Sustainable Development ‘CITES COP-12 Highlights’ *Earth Negotiations Bulletin* 13 November 2002 <http://www.iisd.ca/download/asc/enb2127e.txt> (accessed 29 July 2006).

reason for Antigua and Barbuda's interest - and vote - must surely be found in linkage with whaling and the IWC.

Recognition of the need for funding incentives to be provided to the developing world in international environmental treaties can be seen in Resolution 12.36, CITES COP 12:

... Parties, donors and organisations are requested to provide urgent financial and technical support to strengthen the implementation of Resolution Conf. 10.10 (Rev. COP 12) regarding control of [the] internal ivory trade in elephant range States ...¹¹⁹⁹

Kenya, however, opposed proposals at CITES COP 12 to re-open the ivory trade¹²⁰⁰ and warned that it will continue to press for increased restriction of the ivory trade.

5.3.13 The sale (that didn't happen) of ivory, 2004

In March 2004, the South African Department of Environmental Affairs and Tourism announced that South Africa, Botswana and Namibia had met all the requisite conditions for international trade in ivory. The process was, however, delayed due to 'lack of data from certain south-east Asian countries. The issue was expected to be discussed at the meeting of the International Convention on International Trade in Endangered Species (CITES) in Switzerland last week, [this being the Standing Committee meeting] but was not on the agenda because certain countries in south-east Asia had not yet provided baseline information on the monitoring of the illegal killing of elephants'.¹²⁰¹

The International Fund for Animal Welfare (IFAW) reported in March 2004 that 'Kenya, Uganda, Ethiopia, Mali, Cameroon, Tunisia and Ghana are concerned that conditions under which the [Southern African] ivory should be sold have not been met'; and that these countries had said that 'until the conditions are met, no sales should be allowed to take place. The decision was taken at a meeting in Nairobi this week'.¹²⁰²

In contrast to Southern African efforts to sell stockpiles of ivory; in July it was reported that '[a] group of twelve central and west African states have called on all governments in the continent's elephant range to ban trade in ivory,¹²⁰³ ... [t]he countries¹²⁰⁴ called for support from other African states for the initiative, at the Committee for the [CITES] due to be held in Bangkok in October'.¹²⁰⁵ Clearly, consensus on the reopening of the ivory trade was going to be controversial for at least a number of years yet.¹²⁰⁶

¹¹⁹⁹ *Ibid.*

¹²⁰⁰ 'Kenya against ivory proposal' in *Daily News* 4 September 2002 at 4.

¹²⁰¹ 'SA on track to sell ivory stocks' *SAPA Mail and Guardian Online* 24 March 2004

<http://www.mg.co.za/Content/13.asp?ao=33072>. See (n 1179).

¹²⁰² 'Pressure on SA to abort ivory sales' in *Natal Witness* 11 March 2004

http://www.witness.co.za/content/2004_03/22474.htm.

¹²⁰³ 'Ban ivory trade - Africa' *news24.com* 2 July 2004 http://www.news24.com/News24/Africa/News/o,,2-11-1447_1552106,00.html (accessed 21 March 2005).

¹²⁰⁴ Congo, Benin, Democratic Republic of Congo, Chad, the Central African Republic, Gabon, Niger, Mali, Togo, Ivory Coast, Senegal and Guinea. *Ibid.*

¹²⁰⁵ *Ibid.* It is interesting to note the stance taken by these countries on elephants, and to compare it to the sustainable use and pro-trade line which many of them take in the IWC. See 16 generally.

¹²⁰⁶ See 5.3.26.

5.3.14 The lead up to COP 13

As stated above, in early 2004, it was reported that the South African Department of Environmental Affairs and Tourism (DEAT) had claimed that all of South Africa, Botswana and Namibia had met all the conditions for international trade in ivory, but that the process had been delayed due to a lack of provision of data from certain south-east Asian countries. The issue, according to DEAT, had been expected to be discussed at a CITES meeting in Switzerland, but was not on the agenda 'because certain countries in south-east Asia had not yet provided baseline information on the monitoring of the illegal killing of elephants'. Dr Pieter Botha, who represented South Africa at the meeting, was quoted as saying that '[i]t is a pity that the matter had to be moved once more. As South Africa, we are more than ready to engage in this exercise'. He apparently said further that the next occasion for discussing ivory sales would only be in October 2004; but that if the South East Asian states had not yet produced the data by then, the issue would have to wait until 2005.¹²⁰⁷

On the other hand, it was reported in September 2004 that there might not be as many elephants in southern Africa as previously thought. In this regard, it was alleged that Zimbabwe might have deliberately inflated the figures for the country's elephants in order to persuade the CITES parties to allow Zimbabwe to trade ivory. In somewhat excitable language, the media report suggested that the real motive behind such inflation might be not so much resumed ivory trading; as politically well-connected persons looking for 'an opportunity to cash in on the ivory stockpiles they have accumulated from the indiscriminate shooting of animals in seized private game parks and in national parks'.¹²⁰⁸

Linkage between CITES and the IWC was raised in April 2004, when Kenneth Stansell, of the US Fish and Wildlife Service, addressed a House Resources Subcommittee, in the US, on the forthcoming CITES COP. He described CITES as being 'one of the most effective forces in the world today for conservation of fauna and flora, both in halting the trade in species which are threatened with extinction and in fostering sustainable trade in other vulnerable species'. He then said that the Service anticipated that there would be 'several proposals dealing with whales'; explaining that '[t]his is a very contentious issue that has a long history within CITES'. Proposals, he suggested, 'to downlist stocks of both Bryde's whales and minke whales from Appendix I to II by Japan have been defeated at the last four CITES meetings'; and argued that '[i]f adopted, these proposals would re-open international commercial trade in whale products, and could foster increased poaching of protected whale species'. The US, Stansell said, 'continues to be strongly opposed to the downlisting of whale species in accordance with the commercial whaling moratorium of the [IWC]'. He then explained that the US 'believes' that CITES 'should honor the request for assistance in enforcing the moratorium which was communicated by the IWC to CITES in 1978'. Stansell concluded with something of a sop to supporters of sustainable use, by explaining that the US is continuing 'to participate in the IWC efforts to develop a Revised Management Scheme (RMS) that includes an effective inspection and observation scheme for use in the event that the moratorium on commercial whaling is lifted'.¹²⁰⁹ Supporters of sustainable use would

¹²⁰⁷ 'SA on track to sell ivory stocks' *Mail & Guardian online* 24 March 2004, <http://www.mg.co.za/Content/13.asp?ao=33072> (accessed 24 March 2004).

¹²⁰⁸ B Peta 'Zim inflated its elephant population' *Daily News* 16 September 2004 at 7.

¹²⁰⁹ K B Stansell 'Testimony of Kenneth B Stansell, Assistant Director, International Affairs, United States Fish and Wildlife Service, Department of the Interior, before the House Resource Subcommittee on Fisheries Conservation, Wildlife

probably argue, however, that the US has no genuine intention of completing an RMS at any point in the near future.

In July 2004, it was reported that the IFAW-promoted move, mentioned earlier, by a group of central and west African states to have a ban placed on the trade in ivory' could 'present South Africa with an elephant-sized headache'.¹²¹⁰ According to the report, Nick King, Director of the Endangered Wildlife Trust, a South African NGO, said that '[w]e are the victims of our own success' and that '[i]f other countries have elephants moved to Appendix I, it will make it hugely problematical for South Africa. We need to find a more equitable solution for everyone concerned'.¹²¹¹

In the lead up to the CITES decision, it was reported that 'African nations announced ... a continent-wide plan to crack down on their unregulated domestic ivory trades blamed for the deaths of up to 12 000 elephants a year'. The draft plan, which the report said was expected to be approved by CITES, 'commits every African nation with a domestic ivory market to strictly control its trade or shut it down completely'.¹²¹²

Writing in October 2004, Leakey argued that '[t]his week, delegates from 166 countries have gathered in Bangkok for another meeting of the convention, set up to ensure that trade in wild animals and plants does not threaten their survival. However, it is clear that parties to CITES - not least the UK government - are trying to alter its aims'.¹²¹³ Swayed, according to Leakey, 'by the doctrine of sustainable development and the market economy', such parties 'have developed a cavalier attitude towards the very species the convention was created to protect.' Further, he argued, such parties 'are promoting trade where there is need for caution'.¹²¹⁴

'Sustainable use', continued Leakey, 'may sound reasonable, but in reality it dodges definition. There is a gulf between ecological and economical sustainability'. As evidence for this proposition, he argued that it would be possible immediately to slaughter all elephants and, through invested profits, maintain 'an economically sustainable ivory trade' for years to come, even for perpetuity. It is unsurprising, he argued, 'that the reprieve for elephants has not lasted'; as, swayed by a few southern African countries, whose elephant populations are fenced-in and relatively unaffected by poaching, CITES parties have agreed to allow sales of stockpiled ivory. Subsequently, he explains, there has been a resurgence in poaching and ivory seizures 'to a level not seen since before the ban'. Yet, according to Leakey, 'the push to reopen the trade continues' with Namibia proposing both an annual ivory export quota and an ongoing trade in worked ivory, elephant hair and - with South Africa - leather. These countries, explained Leakey, 'say they have the right to profit from their natural resources. This sounds reasonable until one considers that many poorer countries are campaigning

and Oceans regarding the international aspects of fish and wildlife conservation' 29 April 2004

<http://www.fws.gov/laws/Testimony/108th/2004/StansellInternatWildlife.htm> (accessed 29 July 2006).

¹²¹⁰ M Ryan & SAPA 'Trade ban a threat to SA elephant success story' *Sunday Tribune* 4 July 2004 at 5.

¹²¹¹ *Ibid* at 5. See (n 915), (n 1109), (n 1137) and (n 1643).

¹²¹² 'Africa to stem ivory trade' *news24.com* 8 October 2004 http://www.news24.com/News24/Africa/News/0,6119,2-11-1447_1602195,00.html (accessed 21 March 2005).

¹²¹³ Ironically, this charge is often made by Japan in respect of the ICRW.

¹²¹⁴ R Leakey 'A poachers' charter' *The Guardian* 7 October 2004

<http://www.guardian.co.uk/comment/story/0,,1321353,00.html> (accessed 4 June 2006). In Leakey's words, '[o]pening up even a limited legal trade creates a smokescreen, allowing the illegal market to thrive and making effective policing next to impossible'. *Ibid*.

against this'. Kenya, he concluded, 'supported by many other African states, is proposing a 20-year moratorium on ivory trade'; with his final point being the assertion that 'the economics of the ivory trade do not add up'.¹²¹⁵

5.3.15 COP 13, 2004

It was, however, reported on the question of CITES and ivory, that, in October, 'Kenya mounted an unsuccessful bid to impose a 20-year moratorium on commercial ivory trade ... Kenya argued that the failure of the ban would encourage poaching in Africa, further endangering between 400 000 and 600 000 elephants. Instead of a moratorium, several southern African countries - Botswana, Namibia and South Africa - got the go-ahead to begin commercial trade in elephant leather goods'.¹²¹⁶ East and West Africa opposed Southern Africa, therefore. In further media reporting on the COP, and with a more positive tone, it was said that '[t]he African elephant has a new line of defence against poachers after ... [a] majority of the representatives of the 166 signatory countries of [CITES] - held in Bangkok - agreed on the plan to eradicate illicit ivory sales'. The initiative, according to the media, 'calls for new law enforcement links between African countries, the global police agency Interpol, customs officials and airlines that might handle shipments of smuggled ivory'.¹²¹⁷

In regard to the CITES COP, it was further reported that CITES 'approved sweeping measures to wipe out the continent's illegal ivory trade and rejected a Namibian bid for an ivory export quota'.¹²¹⁸ According to the report, the Namibian request for a partial lifting of the ban (to allow it to export 2 000 kilograms of ivory annually from elephants that died of natural causes) was dismissed; but the COP approved the country's 'commercial trade' in elephant hair and skin. The difference here was that, previously, Namibia had been permitted to trade in elephant hides for non-commercial purposes only. Likewise, a proposal by South Africa to allow trade in elephant skin was approved. Namibia, however, was 'denied a request to sell carved elephant ivory encased in jewellery'.¹²¹⁹

Kenya, it was reported, along with several other Central and West African countries, had 'vehemently opposed the Namibian proposal, and earlier on Monday was refused a request to have one-time ivory stockpile sales postponed for six years'. In reaction, Kenya apparently expressed fears that 'the move would be a signal to poachers that eventually they would be able to sell illegal ivory'. Dr Peter J Stephenson, co-ordinator of the World Wildlife Fund's African Elephant Programme, however, 'hailed the decision' as 'a conservation victory'.¹²²⁰ This implies that the WWF seems to be approving of at least a limited trade.

Despite no authorisation being given for resumed ivory trading, it appears that pro-sustainable use countries won a number of victories at the COP. According to the IISD, COP 13 had

¹²¹⁵ *Ibid.*

¹²¹⁶ 'CITES boosts Kenya's elephants' news24.com 10 March 2003 http://www.news24.com/News24/Africa/News/0,,2-11-1447_1674548,00.html (accessed 21 March 2005).

¹²¹⁷ 'Measures throw lifeline to elephants' *Daily News* 12 October 2004 2.

¹²¹⁸ 'Plan to end illicit ivory sales' news24.com 12 October 2004

http://www.news24.com/News24/Technology/News/0,6119,2-13-1443_1603429,00.html (accessed 21 March 2005).

¹²¹⁹ *Ibid.* The opening of trade in elephant hides is probably not something that would have a direct effect on the illegal ivory trade. Thomson has written that elephant hide 'is a very specialized product requiring sophisticated treatment that the traditional ivory poacher of Africa cannot provide'; and that '[i]vory poachers *never* recover elephant hide'. R Thomson *On Wildlife "Conservation"* (1986) at 179.

¹²²⁰ *Ibid.*

included 50 proposals to amend the CITES appendices; as well as - importantly - cooperation with the Convention on Biological Diversity (CBD) and the [FAO]. The IISD reported further that in respect of the African elephant, Namibia had its request for an annual ivory quota rejected, but was given permission to proceed with ‘a strictly controlled sale of traditional ivory carvings’; with the COP apparently also agreeing to ‘an action plan aiming to crack down on unregulated domestic ivory markets’.¹²²¹

5.3.16 Ongoing events in 2004

As a success story, it was reported in June that ‘[a] hardline government anti-poaching campaign and widespread community support have brought Burkina Faso’s tiny elephant population back from the verge of extinction. Conservation authorities in this small, impoverished West African nation announced this week that an official census indicated the country’s elephant population had increased from 350 animals to more than 4 500 after 20 years of community-based anti-poaching campaigns’.¹²²² It must be questioned, however, whether these are realistic natural increase figures. The figures seem ludicrously high to the present writer, especially as elephants simply do not begin to breed until they are approximately twenty years old.

5.3.17 Early events in 2005

According to Kenya, the Appendix I listing has led to a marked increase in elephant numbers in that country. It was reported in March 2005 that ‘Kenya’s elephant population had jumped by about 10% in the past three years due to a strict clampdown on poaching in the east African nation’;¹²²³ and that, ‘[d]espite an apparent surge in the illegal ivory trade and several nationally publicised poaching incidents’, the KWS had discovered that elephants were ‘thriving’ in Kenya’s 32 national parks and reserves.¹²²⁴ Probably, these are more realistic figures than those of Burkina Faso.

Botswana, in March 2005, made overtures toward Zambia in respect of culling elephants. Botswana’s President Festus Mogae, according to a report, was ‘expected to ask Zambian President Levy Mwanawasa for support to downgrade the status of elephants under [CITES]’; according, apparently, to a foreign ministry official speaking on condition of anonymity. The official apparently said that Botswana has an overpopulation of elephants and that Mogae ‘wanted to move elephants to a different category under CITES that would allow them to be culled’ to ‘acceptable levels’.¹²²⁵ This appears to be an - apparently official - misunderstanding that CITES somehow prevents culling. CITES does not. A country may, if it desires to, cull as many elephants as it likes. That would simply be a domestic management decision.¹²²⁶ The

¹²²¹ International Institute for Sustainable Development ‘54th Meeting of the CITES Standing Committee’ *Earth Negotiations Bulletin Vol.21 No.50* 9 October 2006 <http://www.iisd.ca/cites/sc54/> (accessed 10 October 2006).

¹²²² ‘Burkina Faso’s jumbos thriving’ *news24.com* 2 June 2005 http://www.news24.com/News24/Africa/News/0,,2-11-1447_1536488,00.html (accessed 21 March 2005).

¹²²³ ‘CITES boosts Kenya’s elephants’ *news24.com* 10 March 2003 http://www.news24.com/News24/Africa/News/0,,2-11-1447_1674548,00.html (accessed 21 March 2005). It was reported that ‘... “[i]n 2002, we estimated there were 27 000 elephants, now we estimate that the elephants have increased to about 30 000”, Kenya Wildlife Service (KWS) spokesperson Edward Indakwa said. *Ibid.*

¹²²⁴ *Ibid.*

¹²²⁵ ‘Botswana wants elephant cull’ *news24.com* 9 March 2005 http://www.news24.com/News24/Africa/News/0,,2-11-1447_1673362,00.html (accessed 21 March 2005). See [5.3.19](#).

¹²²⁶ See (n 470), (n 933), (n 1658) and (n 2220).

underlying logic, or rationale, appears to be, however, that it is simply impossible to cull if one cannot then sell the tusks.

5.3.18 Toward CITES COP 14, 2007

Of huge importance, in October 2006 it was reported that the Standing Committee of CITES had rejected a request by South Africa, Botswana and Namibia to proceed with the once-off sale of stockpiled ivory, that had been provisionally approved in 2002. Blessing Manale, spokesman for the Department of Environmental Affairs and Tourism, apparently said the Department had been ‘very disappointed that the CITES decision had not gone their way’. The matter would next be considered at the next meeting of the Standing Committee - the function of which is to oversee the implementation of CITES decisions in between COPs - in May of 2007.¹²²⁷

‘Conservationists’, according to the report, clearly meaning preservationists in the terminology used in the present thesis, had ‘applauded the decision, saying the 60 metric tons of stockpiled ivory, representing thousands of elephants, would have placed endangered elephants in Africa and Asia under increased threat from poachers’. The same ‘conservationists’, however, apparently ‘condemned’ another decision which was taken by the committee. China and Japan had both applied to be ‘trading partners’ for purchase of the stockpiles; but although China had withdrawn its application, Japan had been approved - an important step toward future sales. In criticism of this decision, it was argued that the ‘one-off’ stockpile sale to Japan in 1999 had apparently ‘resulted in ivory markets spinning out of control in Asia’; with one David Newton, the national representative for TRAFFIC (Trade Record Analysis of Fauna and Flora in Transit) in South Africa, apparently saying that ‘although South Africa had proper monitoring in place, this was not the case in many other countries’.¹²²⁸

According to an official press release from CITES in October 2006, the CITES Standing Committee had decided that one of the conditions, in terms of which exports of ivory by Botswana (20 tonnes), Namibia (10 tonnes) and South Africa (30 tonnes) had been allowed in principle, had not been met. According to the press release, ‘[t]he long-running global debate over elephants has focused on the benefits that income from ivory sales may bring to conservation and to local communities living side by side with large and often dangerous animals versus concerns that such sales may increase poaching;’ and that ‘the baseline data

¹²²⁷ E Momberg & M Ryan ‘Ivory stockpile plan kiboshed’ *Sunday Tribune* 8 October 2006 at 5. It was reported that ‘[t]he Department of Environmental Affairs and Tourism has slammed last week’s decision by [CITES] to suspend the sale of 60 tons of stockpiled ivory held by South Africa, Botswana and Namibia, arguing that it would not trigger an increase in poaching. “We [South Africa] are not happy because we have 30 tons of stockpiled ivory and that money would have helped to advance our conservation mandate,” said the department’s acting chief director of communications, Blessing Manale, refuting CITES’s reasoning. “There are no sales now and there is still an illegal market” ...’. K Sosibo ‘Ivory sale ban irks SA’ *Mail & Guardian* 13 October 2006 at 12.

¹²²⁸ E Momberg & M Ryan ‘Ivory stockpile plan kiboshed’ *Sunday Tribune* 8 October 2006 5. On what actually happened, according to the IISD, [t]he 54th meeting of the Standing Committee (SC-54) of [CITES] convened in Geneva ... from 2-6 October 2006. [] The SC [] agreed to [] designate Japan as a trading partner for the one-off sale of ivory stockpiles from Botswana, Namibia and South Africa, but not to proceed with the sale at this point; ...’. International Institute for Sustainable Development ‘54th Meeting of the CITES Standing Committee’ *Earth Negotiations Bulletin Vol.21 No.50* 9 October 2006 <http://www.iisd.ca/cites/sc54/> (accessed 10 October 2006).

will make it possible to determine objectively what impact future ivory sales may have on elephant populations and poaching'.¹²²⁹

Also at SC-54, it was reported that Finland, on behalf of the EU as it held that body's rotating presidency, 'welcomed the new strategic approach taken by CITES',¹²³⁰ and noted that 'reducing the rate of global biodiversity loss should be the overarching objective of the Plan'. Japan, however, 'opposed the proposed Strategic Plan objective, which states that the SC has the primary role in promoting compliance and addressing non-compliance with CITES'.¹²³¹

Clearly, reducing global biodiversity loss can best be argued as being within CITES' mandate if one sees the treaty as having changed its emphasis since its inception in 1973. At inception, the treaty might arguably have had this as a goal - despite condoning (if not actively promoting) trade and targeting certain species only - but it requires something of a stretch of the imagination.

5.3.19 COP 14, 2007

CITES COP 14 was held from 3rd to 15th June 2007, in The Hague, The Netherlands.

In the lead up to COP 14, Botswana and Namibia proposed that in future the elephant populations of Botswana, Namibia, South Africa and Zimbabwe be subject to a maintenance regime involving annual export quotas for trade in raw ivory; that this trade be restricted to trading partners certified by the Secretariat to have 'sufficient national legislation and domestic trade controls to ensure that the imported ivory will not be re-exported and will be managed as determined by CITES Res. Conf. 10.10 (Rev. CoP12); and that the proceeds of the trade in raw ivory will be used 'exclusively for elephant conservation and community development programmes'.¹²³² Botswana proposed, also, that in respect of its own population trade in hunting trophies be allowed; also trade in hides, and in leather, for commercial purposes; also trade in live animals for commercial purposes (to appropriate and acceptable destinations); also trade annually in stocks of raw ivory (whole tusks and pieces, of not more than 8 tonnes) of stocks owned by Botswana's Government and from Botswana, for commercial purposes, with trading partners certified by the Secretariat to have sufficient controls to ensure that the ivory will not be re-exported; and that there be a once-off sale of the Botswana government's stockpile (of not more than 40 tonnes), immediately after the adoption of the proposal, with trading partners certified by the Secretariat to have sufficient controls to ensure that the ivory will not be re-exported.¹²³³

¹²²⁹ 'CITES puts ivory sales on hold' *CITES Press Release* 5 October 2006

http://www.cites.org/eng/news/press_release.shtml (accessed 27 October 2006).

¹²³⁰ See 'CITES Strategic Plan for 2008-2013' at <http://www.cites.org/eng/com/SC/54/E54-0602.pdf#search=CITES>.

¹²³¹ International Institute for Sustainable Development '54th Meeting of the CITES Standing Committee' *Earth Negotiations Bulletin Vol. 21 No. 50* 9 October 2006 <http://www.iisd.ca/cites/sc54/> (accessed 10 October 2006). Apparently, Japan's representative 'noted [that] the guidelines for compliance should facilitate consistent application of existing mechanisms and not establish new ones, and that the AC and PC lead on RST'. On the other hand, '[o]n the proposed revised mission statement, Kenya and the SSN [the Species Survival Network] urged CITES to keep sight of its original mission of regulating trade in endangered species'. *Ibid.* It is unclear what Kenya and the SSN meant by this. Probably, in response to Japan's comment, they were attempting to equate CITES' original mandate with the new Strategic Approach.

¹²³² CITES 'Proposals for amendment of Appendices I and II' COP 14 2007

<http://www.cites.org/eng/cop/14/prop/index.shtml> (accessed 24 February 2007).

¹²³³ *Ibid.*

5.3.20 *The Tanzanian switch*

A significant development in 2007, one with the potential eventually to change the entire development of restrictions on the ivory trade, was the proposal put forward by Tanzania. Tanzania applied for transfer of its elephant population from Appendix I to II; for the purpose of allowing, firstly, ‘trade in registered stocks of raw ivory in whole tusks and pieces’; secondly, trade in live specimens for non-commercial purposes to appropriate and acceptable destinations’; and, thirdly, ‘trade in hunting trophies for non-commercial purposes’.¹²³⁴

Tanzania’s Proposal was a fairly lengthy document. The rationale given in the Proposal was that ‘the [P]roposal aims at promoting sustainable conservation of the elephant population in Tanzania such that the revenue generated from the sale of the ivory stockpile will be reinvested into wildlife conservation in protected and non-protected areas and support development activities of communities living within the elephant ecosystems’.¹²³⁵

Proposed restrictions included that the ivory traded would be registered and Government-owned ivory originating in Tanzania only; that it would be sold only to CITES-approved trading partners;¹²³⁶ that the sale would occur only after the prospective importing countries had been verified by the CITES Secretariat, and the MIKE Program had reported to the Secretariat on baseline information regarding elephant numbers and illegal killing incidents; and that the maximum amount sold would be 100 000 kg.¹²³⁷ The Proposal then suggested that the Tanzanian elephant population does not qualify for Appendix I listing;¹²³⁸ the population being not small, not restricted to an area, and that the population has increased (from 55 000 in 1989 to 141 000 in 2006). Further, according to the Proposal, the Tanzanian Government has put effective elephant conservation measures in place; including legislation, special training of wildlife officers, an elephant management plan, expansion of its protected areas network, provision for portion of revenues from sport hunting to go to community development projects, ratification and implementation of various international and regional agreements (including the Lusaka Agreement, ratified in 1996, and the SADC Protocol, ratified in 2000).¹²³⁹

According to the Proposal, culling is not envisaged in order to generate ivory for trade - despite the increasing elephant population - as the proposal is to allow the ‘export of ivory stock in the custody of the Government of Tanzania’. The main rationale put forward appears

¹²³⁴ *Ibid.* See 5.3.12, 5.3.20, (n 1171), (n 1196), (n 1636) and (n 1655).

¹²³⁵ CITES ‘Proposal by the United Republic of Tanzania to downlist its elephant population from Appendix I to Appendix II: submitted by Tanzania’ COP 14 2007 WORKING DOCUMENTS SUBMITTED BY PARTIES http://www.cites.org/common/cop/14/raw_props/E-TZO1-Loxodonta%africana.pdf (accessed 24 February 2007) at 2.

¹²³⁶ As per Res.Conf. 10.10 (Rev. COP12).

¹²³⁷ CITES ‘Proposal by the United Republic of Tanzania to downlist its elephant population from Appendix I to Appendix II: submitted by Tanzania’ COP 14 2007 WORKING DOCUMENTS SUBMITTED BY PARTIES http://www.cites.org/common/cop/14/raw_props/E-TZO1-Loxodonta%africana.pdf (accessed 24 February 2007) at 2-3.

According to the Proposal, by the end of 2005 Tanzania had a stockpile of more than 100 tones (*sic*) ‘well secured in a strong room at the Wildlife Division headquarters’ under ‘permanent surveillance’; and also two smaller stocks of about 12 tones. Subsequent to COP 10, the Tanzanian stockpile was registered with the CITES Secretariat and checked by TRAFFIC. The costs involved in storing the stockpile - collection, storage, management, surveillance, fumigation and monitoring - currently cost about US\$ 50 000 per year. *Ibid* at 19-20.

¹²³⁸ As per the biological criteria of Res. Conf. 9.24 (Rev. COP13).

¹²³⁹ CITES ‘Proposal by the United Republic of Tanzania to downlist its elephant population from Appendix I to Appendix II: submitted by Tanzania’ COP 14 2007 WORKING DOCUMENTS SUBMITTED BY PARTIES http://www.cites.org/common/cop/14/raw_props/E-TZO1-Loxodonta%africana.pdf (accessed 24 February 2007) at 3-6.

to be that there has been increased human-elephant conflict since the late 1990s, and that putting ivory revenue back into communities would ‘reduce the growing negative attitude by the rural communities towards elephants’.¹²⁴⁰

However, the Tanzanian proposal was withdrawn before CITES met. According to Jennifer Lonsdale, of the NGO Environmental Investigation Agency (EIA), the proposal was withdrawn because EIA convinced the Tanzanian government that poaching is ongoing.¹²⁴¹

Despite the withdrawal of the proposal, the move by Tanzania remains significant. Tanzania is not just an ordinary range state, but is the range state which formally proposed the Appendix I listing of the elephant in 1989. That Tanzania, at least initially, in 2007 considered its elephant numbers to be sufficiently stable, poaching to be under control, markets to be receptive, and - perhaps most significantly - the general *zeitgeist* to have changed enough to have made the proposal is, in my opinion, an important indicator of the direction in which international regulation of the wildlife trade is heading.

5.3.21 *Opposition to trade*

On the other hand, Kenya and Mali submitted an annotation proposal to amend the populations of Botswana, Namibia and South Africa so that ‘no trade in raw or worked ivory shall be permitted for a period of twenty years’ - except for ‘raw ivory exported as hunting trophies for non-commercial purposes’; and for ‘ivory exported pursuant to the conditional sale of registered government-owned ivory stocks agreed at the 12th meeting of the [COP]. Further, the proposal was to do away with the permissible trade by Namibia of ‘individually marked and certified *ekipas* incorporated in finished jewellery’.¹²⁴²

5.3.22 *South Africa’s approach*

Just a few days before the CITES 2007 COP opened, the present writer asked Marthinus van Schalkwyk to comment, although not in great detail, on the philosophy behind the country’s approach. van Schalkwyk replied as follows:

[I]et me immediately say that we have a very cautious approach in this regard. We haven’t even sold the 30 tons of ivory that we were allowed previously by CITES, so it is not that we would like to restart the ivory trade and trade in volumes. Not at all. It is simply that we have stocks, when we believe it’s sustainable, we think that we should give practical content to that and it is based on the principle that money would have to go back for conservation ... but we really have a very cautious approach ... in this regard.¹²⁴³

The present writer then pointed out what whaling issues would come up again at CITES, and that Japan has put forward several proposals, aimed either at circumventing or undermining, whichever word you choose to use, which seek to have CITES, through its Animals

¹²⁴⁰ *Ibid* at 8-9.

¹²⁴¹ *Personal communication* Jennifer Lonsdale, Anchorage, 31 May 2007; E Couzens. [Note that this was not a formal interview.]

¹²⁴² CITES ‘Proposals for amendment of Appendices I and II’ COP 14 2007

<http://www.cites.org/eng/cop/14/prop/index.shtml> (accessed 24 February 2007). An *ekipa* appears to be a traditional ivory ornament worn by people from tribes in Northern Namibia.

¹²⁴³ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens. See (n 1640) on the proceeds of sales of ivory being used to promote conservation.

Committee, discuss questions of whale management; and asked the Minister how he felt about this linkage between treaties. van Schalkwyk's reply was as follows:

[w]ell, we will oppose efforts to undermine the IWC so we will take quite a strong stance on that. This meeting was quite interesting. This is my first IWC meeting, but people who attended the previous one said that the mood here was much better and the debate was much more civil which I think is not only an issue of style but there's a signal which I think many countries are trying to send by the way that they participated in this debate, and I hope that that will continue at CITES. I just have a feeling some countries may back off and hopefully Japan [?] before we get to CITES.¹²⁴⁴

5.3.23 Elephants at COP 14

The various participants in the fraught negotiations toward agreement on ivory spent the first few days of the COP locked in disagreement. According to the *Earth Negotiations Bulletin*, however, a glimmer of hope for a deal had begun to emerge by the 11th of June - based on stockpile sales by the four southern African range states, and a moratorium of approximately a decade. At this stage, though, none of the existing proposals were withdrawn by the various protagonists.¹²⁴⁵ On the 12th of June, parties discussed the Monitoring of Illegal Killing of Elephants (MIKE) programme; with the US expressing continued support for the programme and stressing that there ought to be more regular communication between donors and range states. Kenya argued that MIKE baseline information should be made easier to understand by range states. The EU argued that MIKE ought to be considered viable and supported. The range states partially agreed; with Botswana urging range states to include MIKE activities within national budgets. South Africa supported Botswana on this. Zimbabwe and Zambia both 'emphasised political will, law enforcement and strengthened management to combat elephant poaching'.¹²⁴⁶ The Elephant Trade Information System (ETIS) was then reported back on by TRAFFIC, as Chair of the MIKE-ETIS Working Group. TRAFFIC reported that the ETIS database contains '12 378 seizure records from 82 countries and territories' - representing a total of 322 tonnes of ivory - collected since 1989 alone. The implications of this apparently are a decline in illicit trade between 1999 and 2004; and a sharp increase since 2005 - with Cameroon, China, the Democratic Republic of Congo, Nigeria and Thailand being the countries of most concern. However, TRAFFIC reported that, in its view, the ETIS data do not support allegations of a correlation between downlistings on CITES Appendices, or the resumption of legal ivory trade, and increased illegal trade or poaching. Instead, TRAFFIC contended, the main factors behind increased illegal trade were 'unregulated domestic ivory markets, organised crime, and poor governance'.¹²⁴⁷

The Chair then stated that the African Elephant Range States Dialogue process had not achieved consensus and that, per the Rules of Procedure, listing proposals would therefore be considered - beginning with those that are least restrictive of trade. South Africa put forward an amended proposal; which combined the original proposals from Namibia and Botswana, Botswana, and Kenya and Mali. South Africa made a submission, highlighting the common

¹²⁴⁴ *Ibid.* See 6.2.

¹²⁴⁵ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES: Highlights' *Earth Negotiations Bulletin* Vol. 21 No. 57, 12 June 2007.

¹²⁴⁶ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES: Highlights' *Earth Negotiations Bulletin* Vol. 21 No. 58, 13 June 2007.

¹²⁴⁷ *Ibid.* China considered the data to be misleading in regard to China; and 'expressed concern that not designating China as a trade partner in the one-off ivory sale would lead to a re-emergence of illegal trade'. Nigeria and the DRC reported that they are making efforts within their domestic legislation, and their enforcement regimes, to improve; while Botswana and Zambia both supported the ETIS findings *Ibid.*

ground reached on ‘conservation of elephants and their role in economic development, the need to address illegal trade and ivory stockpiles, and monitoring illegal trade through MIKE and ETIS’. As amended, the proposal was to the effect that trade in hunting trophies, hide and hair be permitted; and that trade in registered government-owned raw ivory be permitted, subject to verification of trading partners, and with the proceeds being used exclusively for conservation and community development. Further, the proposal was that a one-off sale be allowed of a maximum of 70 tonnes of ivory for Botswana, 50 for Namibia, 40 for South Africa and 15 for Zimbabwe, in addition to the quantities agreed to at COP 12; and finally that it be provided that no further trade take place before COP 16, with the Standing Committee (SC) being mandated to take a further decision on export quotas and continuity of trade.¹²⁴⁸

Namibia then called on parties to support the proposal, highlighting the livelihood and conservation benefits of trade in ivory. The Namibian delegate, speaking, stressed that Southern African elephant populations ‘are robust and should be treated under CITES provisions for trade in Appendix II species’. The delegate then argued that the proposed six year ‘no trade’ period ‘should enable parties to establish appropriate monitoring measures’; and that a ‘future decision-making mechanism is urgently needed at the SC level for managing trade in these elephant populations’.¹²⁴⁹ The EU then ‘reiterated’ that, while elephants have ‘global charismatic appeal’ and other countries ‘may help by facilitating consensus,’ the ‘core issues should be resolved by African countries’. The EU delegate then proposed that there be an adjournment for further negotiations. This appears to have been a presaging of agreement, with the EU perhaps preparing its citizenry for a backing away from European prescription of a preservationist view.

In the run-up to the COP, the European Parliament had ‘called on’ the Commission and the Member States to support the proposal by Kenya and Mali for a 20-year moratorium on all ivory trade; and had ‘urged’ the same bodies to reject the proposals by Botswana, Namibia, South Africa and Zimbabwe to amend annotations to existing listings so as to allow the establishment of annual export quotas for trade in raw ivory.¹²⁵⁰

The delegate from Kenya then agreed that ‘finding common ground would be preferable to applying different solutions in different parts of Africa’; and further endorsed the call for an adjournment.¹²⁵¹ Apparently, on 13 June discussions continued with an informal ministerial consultation (facilitated by Zimbabwe’s Environment Minister) continuing past midnight.¹²⁵²

On 14 June, Chad and Zambia, on behalf of African countries, presented a compromise proposal on African elephant annotations. The compromise was to the effect of a one-off sale of raw ivory from government stocks registered before 31 January 2007 from Botswana, Namibia, South Africa and Zimbabwe, in addition to the quantities agreed to at COP 12 and subject to verification of trading partners. Further, the proposal was that no further ivory trade

¹²⁴⁸ *Ibid.*

¹²⁴⁹ *Ibid.*

¹²⁵⁰ ‘European Parliament resolution of 24 May 2007 on the EU strategic objectives for the 14th Meeting of CITES’ 24 April 2007 *EN: Official Journal of the European Union* (24 May 2007) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:102E:0451:0455:EN:PDF> (accessed 30 May 2008).

¹²⁵¹ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES: Highlights’ *Earth Negotiations Bulletin* Vol. 21 No. 58, 13 June 2007.

¹²⁵² International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES: Highlights’ *Earth Negotiations Bulletin* Vol. 21 No. 59, 14 June 2007.

proposals shall be submitted to the COP for a period of nine years after the one-off sale; and that ‘the SC may decide to stop trade in case of non-compliance or proven detrimental impacts on other elephant populations’. Further, the proposal contained decisions that the SC would ‘propose a decision-making mechanism for ivory trade by COP 16, and [] review the status of elephants; that range states would develop an African elephant action plan; and that the Secretariat would establish an African elephant fund administered by the SC’.¹²⁵³

Japan then proposed an amendment that aimed to separate the shipment of the one-off sale of ivory that was agreed to at COP 12 from COP 14’s new shipment; however, this proposal was withdrawn after objections by the EU, Kenya and China. The US then expressed concerns about, firstly, duplicating the IUCN’s activities on African elephant action plans; and, secondly, about including Zimbabwe in the ivory sale. The US further ‘encouraged innovative funding sources for the African elephant fund’.¹²⁵⁴ Kenya stressed the importance of monitoring the impacts of the one-off sale; and Namibia ‘underscored the need for a proper decision-making mechanism for future ivory trade’.¹²⁵⁵

The proposal was adopted by consensus - ‘and acclamation’ - and the EU, Botswana, South Africa and Kenya withdrew their respective proposals.¹²⁵⁶ The Secretariat then introduced a proposed action plan for the control of trade in African elephant ivory. Kenya put forward an alternative action plan, which Namibia opposed, and proposed harmonising the two plans. The Chair disagreed on the basis of time constraints; and the Secretariat’s action plan was adopted.¹²⁵⁷

After the COP, the European Parliament (Committee on the Environment, Public Health and Food Safety) explained that the consensus agreement, while authorising the sale as agreed, included a provision that the Secretariat may decide to halt trade ‘in case of non-compliance or proven detrimental impacts on other elephant populations’. The agreement further included the development by the relevant African countries of an African Elephant Action Plan; this Plan to include prohibition of unregulated domestic ivory sales, enforcement of both new and existing legislation, promotion of public awareness, reporting of ivory seizures and any changes to legislation or enforcement measures, and the creation of a new African Elephant Fund to support all of these measures.¹²⁵⁸

This European Parliament Committee then described this consensus between African Ministers as ‘historic’, as ending ‘18 years of controversial debates in CITES’, and as ‘paving the way for more constructive dialogue on elephant conservation programmes in the coming years’ - with discussion on a mechanism for decision-making on future sales to occur only after COP 16.¹²⁵⁹

¹²⁵³ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES: Highlights’ *Earth Negotiations Bulletin* Vol. 21 No. 60, 15 June 2007.

¹²⁵⁴ *Ibid.*

¹²⁵⁵ *Ibid.*

¹²⁵⁶ *Ibid.*

¹²⁵⁷ *Ibid.*

¹²⁵⁸ ‘Summary Note: EP Members in the EC Delegation to CITES COP 14’ *European Parliament: Committee on the Environment, Public Health and Food Safety* 2 July 2007

<http://www.europarl.europa.eu/comp/parl/envi/pdf/delegations/2004-2009/cites-2007.pdf> (accessed 30 May 2008).

¹²⁵⁹ *Ibid.*

5.3.24 The compromise on elephants at COP 14

In the result then, at CITES COP 14 a compromise solution was reached, in terms of which certain countries will be able to sell their stockpiles of ivory, but that there will then be a nine-year moratorium on sales. This should have the effect of removing ivory from the agenda for some time; and, paradoxically, might mean that South Africa will even take a harder line on commercial whaling - with the removal of the need to culture support for its proposals on the ivory trade.

5.3.25 The approval of China as trading partner in 2008

In July 2008 China was granted approval, by the Standing Committee of CITES, to be a buyer, along with Japan, of the stockpiles held by Botswana, Namibia, South Africa and Zimbabwe. While the EU voted in favour (through the UK and Bulgaria); it appears that there was a significant opposition bloc of African countries, led by Mali.¹²⁶⁰

5.3.26 The sale that did happen, 2008

In October and November 2008 four auctions, one each in Botswana, Namibia, South Africa and Zimbabwe, were conducted under the supervision of the CITES Secretariat. Altogether, 102 tonnes of ivory were sold to accredited Japanese and Chinese traders - the total amount of money raised from the sales was US\$15 400 000. The average price paid was US\$157 per kg - apparently substantially below the alleged average price for ivory illegally traded in the preceding year (US\$750-850).¹²⁶¹ It seems that on 28 October Namibia sold 7 226 kg for US\$1 186 260; on 31 October Botswana sold 43 153 kg for US\$7 093 550; on 1 November Zimbabwe sold 3 700 kg for US\$500 000; and on 6 November South Africa sold 47 356 kg for US\$6 703 000.¹²⁶²

According to the terms under which CITES authorised the auctions, the proceeds from the sales must be used exclusively for elephant conservation and community development programmes 'within or adjacent to' elephant ranges.¹²⁶³ As an example of this, in Namibia the proceeds will go to the Game Product Trust Fund, created in 1999 to promote conservation in communities in areas where elephants occur.¹²⁶⁴ At time of writing this thesis, it is still far too early (by several years, at least) to comment on the effectiveness of this sort of commitment. The cynical observer might comment that there are many ways in which such stipulations

¹²⁶⁰ J Adetunji 'China given green light to buy African ivory stockpile' *The Guardian* 15 July 2008 <http://www.guardian.co.uk/environment/2008/jul/15/conservation.wildlife> (accessed 16 July 2008). The actual vote was apparently nine in favour, three against, with two abstentions. *Sapa-AP* 'UN gives China ivory import permit' *Daily News* 16 July 2008 2.

¹²⁶¹ CITES Press Release 'Ivory auctions raise 15 million USD for elephant conservation' *CITES.org* http://www.cites.org/eng/news/press/2008/081107_ivory.shtml (accessed 1 December 2008).

¹²⁶² *Ibid.* It is interesting (although at this stage of analysis anecdotal) to do a quick analysis of these figures and see that Namibia's ivory sold for 164.165 per kg; Botswana's for 164.38 per kg; South Africa's for 141.54 per kg; and Zimbabwe's for 135.135 per kg. Zimbabwe's comparatively low figure might reflect the inner turmoil in the country, and South Africa's perhaps the large amount sold. It is slightly puzzling, though, as Botswana sold even more than did South Africa - and Namibia's ivory has sometimes been described as of inferior quality (being apparently more brittle).

¹²⁶³ *Ibid.*

¹²⁶⁴ J Erasmus 'Ivory sale helps elephants' *MediaClubSouthAfrica.com* 31 October 2008 http://www.mediaclubsouthafrica.com/index.php?option=com_content&view=articles&id=804:namibia-ivory-auction-311008&catid=47:africa_news&Itemid=116 (accessed 1 December 2008).

might be circumvented - such as the reducing of funds allocated from other sources to communities which benefit from funds raised by ivory sales.

6 The IWC, CITES and whaling

6.1 Downlisting proposals

6.1.1 *The IWC and CITES: initial concern and resolutions of support*

If the IWC's 1982 moratorium on commercial whaling was to be successful, CITES needed to be brought on board. Lyster tells us that the 'introduction from the sea' of species in the Appendices - 'i.e. bringing specimens taken on the high seas into a State which is a Party to the Convention - is deemed to be international trade and requires a CITES permit'. According to Lyster, further, the introduction from the sea of species in Appendix I of the Convention is prohibited if it is for commercial purposes; and, from 1 January 1986, 'all cetaceans whose catch is regulated by the IWC will be added to Appendix I' - this having been agreed to at CITES COP 4, 1983, 'in order to bring the Convention in line with the IWC decision to halt commercial whaling from 1986'.¹²⁶⁵ The objective of these requirements being 'to ensure that whales, sea turtles and other threatened marine mammals are not taken on the high seas and then brought into the territory of a Party for commercial purposes'.¹²⁶⁶

Birnie suggests that '[initial a]nxiety' about CITES covering the same species as other treaties were 'partially relieved' by the provision in Article XIV(4) that if Appendix II marine species are 'also protected under other treaties or instruments, and a state is party both to CITES and the other relevant treaty', that state does not have to abide by its obligations under CITES in so far as the particular species 'are taken by its flag ships and in conformity with the obligations of the other treaty'.¹²⁶⁷

From a conservationist (as the term was used in the 1970s and early 1980s) point of view; Birnie contends that 'the CITES system provides considerable addition to the limited enforcement procedures of the IWC and, if the new measures are widely enforced ..., should considerably limit further exploitation of cetaceans'. She then says that 'States parties to CITES have resisted moves to weaken the application of the Convention'; and that its 'potential for changing the operations of the IWC' would depend largely on its ratification by all users of whale products and by the 'willingness and ability of its states parties stringently to enforce it'.¹²⁶⁸

M'Gonigle, writing at the end of the 1970s, suggests that although IWC members can circumvent quota restrictions by importing whale products, parties to CITES would be prohibited from doing so once the IWC quota had been included in a CITES appendix. 'Predictably', he says, 'many IWC countries have not ratified the new convention, ... while others have entered reservation to some of its listings'. By way of examples, he gives Iceland in the first category; and, 'notably', Australia, Canada, and the Soviet Union in the second.¹²⁶⁹

¹²⁶⁵ S Lyster *International Wildlife Law* (1985) at 36-7.

¹²⁶⁶ *Ibid* at 249-50.

¹²⁶⁷ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 394-395.

¹²⁶⁸ *Ibid* at 512.

¹²⁶⁹ M'Gonigle tells us that '[a]s of August 1980, there were 60 members of CITES. IWC members not parties to CITES were Argentina, Iceland, Mexico, the Netherlands, New Zealand, Oman South Korea, and Spain. R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 197-198, fn 354. This actually proves little, however, as at least four of these seven were anti-whaling countries at the time that M'Gonigle

6.1.2 Linkage

Links extend beyond the formal. As Birnie writes, '[i]t is not without significance for the gradual spread of a more conservationist approach to management' that delegates to international instruments such as CITES and the CCAMLR often overlap as their countries' commissioners or advisers at the IWC. This, she says, provides 'some informal functional interrelationships' although commenting that these are 'less satisfactory than more formal linkages which ... are now being established'.¹²⁷⁰

Birnie records that at the 1977 IWC Meeting in Canberra, the CITES Executive Secretary, who had observer status, reported that 'agreement had been reached at CITES' first Meeting on categorisation of species and taxon by evaluating biological and trade statistics together'. These would apparently be classified under Appendix I if 'on biological grounds they were threatened with extinction and if, further, they were, or may be, affected by trade in them for any purpose'. Clearly, says Birnie, the IWC analyses 'for purposes of classification of stocks as Protected Stocks under the new management procedures are very relevant to CITES assessment and classifications on biological grounds', and there will therefore be 'scope for confusion if a close relationship [is] not maintained, especially since the membership of the two bodies is not identical'. The IWC, it seems, 'agreed to offer its services to CITES as adviser on cetaceans and also adopted a Resolution calling on IWC members to prevent import into their countries of whale products from non-member nations'.¹²⁷¹

At a Special Meeting of the [IWC] in 1978, a 'Resolution to the CITES' was passed; reading as follows:

WHEREAS, it is the purpose of the International Whaling Commission to provide for the effective conservation and management of whale stocks, and WHEREAS, the International Whaling Commission has adopted a New Management Procedure to carry out that purpose, and WHEREAS, the International Whaling Commission has established regulations which allow no commercial taking of certain species and stocks of whales in given ocean areas, and WHEREAS, in order to contribute to the effort to conserve whales receiving commercial protection from the International Whaling Commission and to reinforce adherence to International Whaling Commission regulations, it is desirable to use each international opportunity to stop the taking and to ban trade in those species and stocks of whales which receive total protection from commercial whaling, BE IT HEREBY RESOLVED by the International Whaling Commission that it request the Second Meeting of the Conference of Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora to take all possible measures to support the International Whaling Commission ban on commercial whaling for certain species and stocks of whales as provided in the Schedule to the International Convention on the Regulation of Whaling.¹²⁷²

At the CITES COP 3, New Delhi 1981, all cetaceans were listed on Appendix I or II; with Appendix I then including the gray, blue, humpback, right, sei, fin and sperm whales. This meant that this Appendix covered all whales listed at that date by the IWC as Protected Stocks and more. All other species of cetacea, Birnie says, 'were placed on Appendix II, though Canada, Japan, Norway and the USSR made reservations on some stocks of sei and fin whales on Appendix I; Canada entered a reservation for the Californian gray whale listings and Japan

wrote this.

¹²⁷⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 406. See D.9.2 where a similar point is made, in recent context, about the same people attending different conventions.

¹²⁷¹ *Ibid* at 490-491.

¹²⁷² *Ibid* at 781.

and Norway for the sperm whales'. She then goes on to record that at CITES COP 4, Gaborone 1983, seven more cetacean species were listed on Appendix I, including some smaller cetaceans 'such as the minke and pygmy right whales regulated by the IWC and four species of bottlenose whale'. Coupled, she explains, 'with the EEC's enactment of CITES, the growth in CITES membership by 1983 (90 signatures; 76 ratifications) and better enforcement as its requirements became more familiar to customs officials and NGOs throughout the world, CITES has had an impressive effect'.¹²⁷³

6.1.3 *The (cross-) purposes of the two Conventions*

The present writer put it to Kleinschmidt that the resolutions dealing with the relationship between CITES and the IWC have been based on the premise that they have the same purpose - preservation -; and then asked whether he agreed with this and how he saw the treaty's purposes. Kleinschmidt said 'I think that it is in both instances about trade ... in the case of the IWC, it is dressed up by the Japanese lobby as a statistical right ... and it is dressed up by the others as not trusting those who want to do the fishing, killing ...'¹²⁷⁴ However, he added, that it was also his view that:

those who are seeking to have bigger access to these whales see this as a step which deals with the inevitable demise of the ocean's resources ... and that the compulsion by which whale meat will have to replace the absence of fish meat on the tables of rich nations and they wish to be there first ... they have the technical know-how to do it'. He felt that this was 'an economic argument ... a utilitarian argument'.¹²⁷⁵

He then described CITES as being, 'in a way, [] a more modern instrument'; and said that he thinks 'there is a point of tension because the one instrument was created for a broader purpose, and of course that broader purpose encompasses whaling as well, and to that extent there's an unresolved issue there'. Ultimately, though, he argued that 'one needs to see the greater context'; which is that

globally the oceans have no comprehensive and binding management systems, and where they exist they are for specific sectors such as over issues of whaling or over aspects of trade (CCAMLR, or over tunas, for specific regions), which 'still leaves 70% of the oceans unmanaged ... and what we are really witnessing here are the last throes of who will dominate and what in the oceans ... since we're now moving into mineral exploitation and oil and gas exploitation in the ... the fight for the ocean floor is going to be, I think, a debate for the next ten years ...'¹²⁷⁶

When the present writer put it to Oosthuizen that the IWC has asked CITES not to undermine it - the wording being 'to recognise its authority' - but that proposals are put forward at every CITES meeting for the downlisting of whale populations; Oosthuizen commented that 'it is basically the same groups at the IWC that just move across to CITES' and that this 'shows very clearly [that] the IWC treaty is not adequate'. Asked then what effect this might have on

¹²⁷³ *Ibid* at 576-77.

¹²⁷⁴ He did say that CITES could have a positive impact on controlling whaling if whale imports to countries were listed by agreement at its meetings and thus scheduled to be reported upon when traded; but also that CITES itself lacks powers to ensure its decisions are adhered to. *Personal communication* Email from H Kleinschmidt to E Couzens, 11 August 2008.

¹²⁷⁵ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. To make this point more clearly, Kleinschmidt explained that, leaving aside historic or traditional rights to the oceans' whale populations, in his view Japan, Norway and Iceland have 'at the backs of their minds' the intention to have dominant and preferential access to a meat source that, in time and according to their own calculations, will become an indispensable food source once other marine species are in even faster decline and the search for protein, on land and in the sea, escalates. *Personal communication* Email from H Kleinschmidt to E Couzens, 11 August 2008. See (n 1900).

¹²⁷⁶ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

the IWC, Oosthuizen said that ‘in the beginning’ there had been ‘some concern about what was going to happen at CITES, but now people feel Japan isn’t going to get a two-thirds majority for downlisting ... so they’re quite relaxed about the role of CITES and so on ... [but that] if there was any indication that parties [might] get a two-thirds majority, then it wd be different’.¹²⁷⁷

Donovan, interviewed by the present writer, said that CITES is a trade organisation whereas, in his understanding, the IWC is not. Some parties, he felt, dislike the fact that the moratorium [on commercial whaling] is a blanket moratorium which does not take into account the status of individual whale populations - and that the moves to use CITES reflect this.¹²⁷⁸ Asked what effect approval of a downlisting of certain whale populations at CITES might have on the IWC, he said that ‘in theory, it shouldn’t have any effect, because they’re not related issues’; and that in practice it was really just ‘sabre rattling’ by opposing sides.¹²⁷⁹

Asked about the relationship between the IWC and CITES, Grandy told the present writer that she felt that the growing membership of the IWC reflected increasing environmental awareness; as more states had become interested in the management of whales - which followed a trend for governments to be more interested in environmental issues in general.¹²⁸⁰ Asked whether it was possible to understand the treaties in isolation, Grandy said that she thought that the CITES Secretariat was actually trying to avoid undermining the conservation measures of the IWC, which she felt is quite normal behaviour for Conventions.¹²⁸¹

6.1.4 Downlisting proposals in 1997

At CITES COP 10 in Harare in 1997, Japan proposed to repeal the long-standing 1997 CITES resolution in which the CITES Parties had supported the IWC by agreeing not to issue any import or export permit for any species protected from commercial whaling by the IWC. This proposal was opposed, by the US and others, on the ground that the IWC has never withdrawn its request for support from CITES in enforcing the moratorium on commercial whaling.¹²⁸² Specifically, the Japanese proposal was for the ‘delinking’ of CITES and the IWC - the proposal was rejected by 51 votes to 27 in a secret ballot.¹²⁸³ This is a very important proposal, indicating, as it does, deliberate linkage by the Japanese of the two treaties.

A feature of CITES COP 10 that did not receive the attention it perhaps deserved is that, at the final voting round of the Conference, a proposal by Norway to downlist the Minke whale from Appendix 1 received more votes in favour than against. However, it did not receive the two-thirds majority needed for a successful downlisting proposal to be adopted. Ironically, the proposal attracted more votes in its favour than there are (or were at the time) parties to the ICRW.¹²⁸⁴

¹²⁷⁷ *Ibid.*

¹²⁷⁸ *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

¹²⁷⁹ *Ibid.*

¹²⁸⁰ *Personal communication* Interview with Nicky Grandy, Cambridge, 1 February 2007; E Couzens.

¹²⁸¹ *Ibid.*

¹²⁸² S S Lieberman ‘CITES COP 10: The Ups and Downs’ 21 October 1997 US Fish and Wildlife Service; www.fws.gov.

¹²⁸³ ‘Japan’s push for secret ballot sets dangerous precedent’

<http://archive.greenpeace.org/~comms/97/bio/press/june13.html>.

¹²⁸⁴ See (n 1289).

Komatsu and Misaki write that '[a]ll whale species managed by the IWC are automatically listed in Appendix I [of CITES]. ... Both Norway and Japan have put on record their objection to the listing of abundant species on a list of endangered creatures, and are therefore exempt from the prohibition'.¹²⁸⁵ This is something common to elephants and whales - both are (or at least certain sub-species thereof are) non-endangered species being protected as though they were endangered. This is presumably another reason why they have become a 'battleground,' ... after all, if they were *truly* endangered it seems unlikely that the debate over their sustainable use could be so bitter.

It was argued by Norway and Japan that newly adopted criteria for listing on CITES should be followed, rather than continuing to follow the dictates of the IWC.¹²⁸⁶ These criteria (the 'Everglades criteria,' adopted by CITES parties meeting at Fort Lauderdale in 1994) replaced the 1979 'Berne criteria' with which CITES had been operating, and provided for regular review of species' listings. In terms of the Everglades criteria, new considerations could apply - such as juxtaposing the positive and negative aspects of trade, in order to consider whether it might not actually be beneficial to the conservation of a species for trade to take place. This is quite a radical turnabout - could it even be considered as the reverse of the ICRW's 'Berlin Initiative' of 2003? - that trade might actually be *beneficial* to species?

Japan and Norway in fact submitted five separate proposals for downlisting specific whale stocks from Appendix I to II, which would have allowed international commercial trade. All of the votes were by secret ballot and none were adopted.¹²⁸⁷

In the lead up to the 1997 CITES Conference of Parties, a publication by the High North Alliance (HNA) suggested that five proposals for the downlisting from Appendix I to II of whale stocks had been submitted to the 10th CITES COP. The Contracting Parties to CITES, said the HNA, 'must decide whether they wish to undertake an independent assessment of the downlisting proposals in accordance with the objectives of CITES and the current listing criteria, or whether they are satisfied that such an assessment is unnecessary in view of the [IWC] ban on whaling'. The HNA's view was that the importance of this was that the way in which CITES chose 'to relate to the IWC' would potentially 'be decisive for the future of CITES'. Today, the NGO argued, the IWC is dominated by a group of states that have declared themselves against any commercial utilisation of whales - irrespective of whether such use 'is sustainable or not'; and that '[b]y basing its own decisions on those of the IWC', CITES would be 'endorsing a policy where myths, cultural preferences and the popularity of certain animals in urban public opinion, mean more than biological and ecological criteria and scientific assessment'. The NGO's conclusion was that, as a result of such endorsement, CITES' credibility as a conservation body' would 'be severely impaired'.¹²⁸⁸ CITES'

¹²⁸⁵ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 106.

¹²⁸⁶ A Gillespie 'Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans' Draft article for publication in (2002) 33 *Ocean Development & International Law* 17 at 35.

¹²⁸⁷ *Ibid* at 35. Per Gillespie, '[t]he proposals were in respect of the Eastern Pacific Grey Whale, the Okhotsk Sea-West Pacific Minke Whale, the Southern Hemisphere Minke Whale, and the Western North Pacific Bryde's Whale. (Japan); and the Northeast Atlantic and North Central Atlantic Minke Whale (Norway)'. *Ibid* at 35.

¹²⁸⁸ 'CITES and the IWC: The Fall of Conservation? The Downlisting of Minke Whales in the North Atlantic' High North Alliance Publication issued in conjunction with the 1997 CITES meeting in Harare, available on <http://www.highnorth.no/Library/Trade/CITES/ci-an-iw.htm> (accessed 12 May 2006) at 2. Per the HNA, at the last COP in 1994, 'Norway also proposed the downlisting of the Northeast Atlantic and North Atlantic Central minke whale stocks. The proposal was rejected by 48 votes to 16, with no fewer than 48 countries abstaining'. *Ibid* at 6.

credibility might have been ‘impaired’ in the High North Alliance’s view; but the margin of the vote was narrow.

According to Komatsu and Misaki, at CITES COP 10 Japan proposed downlisting ‘abundant’ species ‘such as the eastern North Pacific stock of gray whales, western North Pacific stock of minke whales, the Antarctic stock of minke whales, western North Pacific stock of Bryde’s whales’; while Norway proposed that ‘the North-west Atlantic stock and the North Atlantic Central stock of minke whales be down-listed’. They then record that the result of the vote on the Japanese proposal for downlisting of the Antarctic minke whales was 53 in favour, 59 against and four abstentions; and that the (Norwegian) proposal for North Atlantic minke whales gained 57 in favour, 51 against and six abstentions. In summary, they write, ‘about a half of the member nations voted in favour of downlisting the Antarctic minke whales, and more than half voted in favour of downlisting the North Atlantic minke whales’.¹²⁸⁹

6.1.5 *The implications*

It is important to understand that this was not the first time that the pro-whaling countries had tried to use CITES to circumvent the ICRW. Per Komatsu and Misaki, when Norway proposed the downlisting for the first time in 1994, only 16 states voted in favour and 48 against. The ballot was then an open one.¹²⁹⁰ Since then, they suggest, CITES has moved to a secret ballot system, ‘and the results of the more recent ballot reflect the wider and improved recognition of the need for rationale utilization of abundant whale stocks’. They conclude that the lesson to be drawn from this is that Japan ‘is not in the minority in the international community that embraces developing nations’ although Japan ‘may be in the minority within the IWC which in reality is a forum comprising of a limited number of countries’.¹²⁹¹ Obviously, this debate about ballot methods shows very different understandings about transparency and democracy.¹²⁹²

Komatsu and Misaki consider that in these voting patterns there is ‘considerable cause for optimism’, as about half of the CITES members ‘are now prepared to vote in support of whaling’. This, they say, is ‘encouraging, not the least because CITES represents a world-view considerably larger than the 49 nations of the IWC’. They then describe the Japanese as tending ‘to look at the world through the eyes of developed nations, particularly through the eyes of the United States and Europe’; whereas a lesson which Japan could instead take from CITES is that this developed nation view is ‘not the only view of the world, and that the global community is in fact significantly made up of developing nations, of which the Americans and the Europeans are just a part’.¹²⁹³ This is the view that the developing world is more oriented toward sustainable use - which is probably true.

The present writer asked Kleinschmidt whether he would agree that CITES is today being used by the parties who once kept the IWC running as a use-oriented organisation, to undermine the IWC; given that at meetings of CITES since at least 1987 Japan and Norway

¹²⁸⁹ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 152-4.

¹²⁹⁰ See 5.3.7 and (n 1151).

¹²⁹¹ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 152-4.

¹²⁹² See 16.

¹²⁹³ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 107.

have put forward downlisting motions in respect of whale species. He answered that he thought that there have been attempts at that; and that ‘there are a lot of people who don’t like CITES ... for different reasons and certainly as far as whaling is concerned there has been an attempt to damage CITES ...’. Asked whether by this he meant ‘damaging CITES’, or ‘using CITES to damage the IWC’; he said that this ‘depends on which side of the divide you stand on, of course’.¹²⁹⁴ Asked whether, at the IWC, people had discussed the relationship with CITES, and the possibility of using one treaty to undermine the other, he said, somewhat cynically perhaps, that:

no ... it never formed the centre of the debate ... there were comments in bilateral discussions with people ... but what I found, there are careerists in different governments who deal with IWC policy ... and there are careerists who deal with CITES ... and - it sounds horribly cynical, but - I’m sorry to say that the debate in part cannot be advanced because there are vested interests in the ritual that you go through every year ... departments that are funded by governments and you go to an exotic place in the world and it costs an arm and a leg and some of these countries can’t afford it at all ... questionable whether South Africa can afford it ... and thus we go to CITES, and we go to IWC, and ... but it’s part of a ritual ... there’s something horribly wrong there ... they tinker with it by saying we’ll give developing countries a lower membership fee ... that’s the extent of it.¹²⁹⁵

Pursuing a similar line of questions with Butterworth, the present writer asked again about the purposes of the ICRW and CITES; and also whether it is possible to understand either CITES or the IWC in isolation from each other. In this regard, the writer posited it as an irony that CITES was once more protective than the IWC, but probably no longer is; and asked whether how significant it might be, given this swop of positions, that CITES is a far more representative body (numerically) of the world’s states. Butterworth suggested in reply that the swapping of positions was ‘a trend which has probably stabilised now’ and that the CITES option had been pursued ‘because the whaling countries at Fort Lauderdale in 1994 got a fair amount of support for the downlisting of minke whales’, and because ‘the IWC was deadlocked and this was seen as a way of making a moral case argument’. He argued, however, that the ‘game’ has ‘probably been played to a conclusion by the EU operating as a bloc and having 26 votes’; and because of the ‘control at the moment on issues like this by NGO movements’. These factors, he argued, ‘probably mean that there’s no chance that CITES could ever go to a majority on this’ - but that the use of CITES ‘served a purpose, to highlight the issue’ and ‘also to show that CITES on this issue is not working in terms of its criteria’.¹²⁹⁶

He did then observe, however, that there are currently some interesting developments at CITES. In particular, firstly, the potential involvement of a newly formed Food and Agriculture Organisation (FAO) committee created to comment on CITES’ marine proposals¹²⁹⁷ - although the FAO appears, sensibly, to have steered clear for the moment of involving itself in questions relating to marine mammals. Secondly, he explained that the CITES Animals Committee agreed in 2007 that it would, after the CITES COP, give consideration to Icelandic

¹²⁹⁴ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

¹²⁹⁵ *Ibid.* Kleinschmidt explained his words further by adding that, ‘in other words, some of those who defend the whales also play their part in an annual game and go home feeling satisfied that they have tinkered with the wording of resolutions’. In the IWC, he added, the ‘principle of negotiated settlements’ has become ‘protracted to the point of futility’. *Personal communication* Email from H Kleinschmidt to E Couzens, 11 August 2008.

¹²⁹⁶ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

¹²⁹⁷ *Ibid.*

fin whales - Iceland being 'tasked to prepare a set of documents as a basis for discussion,' and having 'asked NAMMCO for advice'.¹²⁹⁸

6.1.6 Downlisting proposals and shifting attitudes

Something that Japan and Norway *do* very clearly appear to be doing is playing off the IWC and CITES against each other; and in fact attempting even to undercut the IWC through attempts to downlist whale species at CITES. As CITES holds its Conference of Parties every two to three years and the IWC meets annually, it is easy enough to apply this pressure fairly regularly. On the flip side, of course, it can be charged that the anti-whaling states are essentially doing the same thing by using their votes at CITES to uphold IWC resolutions; although this seems to be less a deliberate policy than a reaction to the Japanese and Norwegian efforts. After all, it is the Japanese and Norwegians who put forward the downlisting proposals at CITES COPs.

In 1998, at the 50th meeting of the IWC, a 'Resolution on Cooperation between the IWC and CITES' was passed.¹²⁹⁹ Both Japan and Norway opposed the Resolution, arguing that it was 'trespassing on the competence of other organisations' - such other organisations ('more appropriate forums') being either the World Trade Organisation (WTO) or CITES.¹³⁰⁰ Despite the export of whale products being a trade issue, it is hard to support an argument that the WTO would be a more appropriate forum than the IWC for dealing with issues relating to cetacean conservation; or even that the WTO would be a more appropriate body than CITES.

In 1999 the IWC issued a Resolution recognising that it has not yet completed the necessary measures to ensure that commercial whaling catch limits are not exceeded, that whale stocks can be adequately protected, and that all whaling by IWC member countries is brought under effective IWC monitoring and control.¹³⁰¹ With this Resolution, the IWC reaffirmed the importance of its relationship with CITES and advised CITES once again that zero catch limits are still in force for all species of whales managed by the IWC. It is in no way spurious for the present writer to link CITES and the ICRW/IWC - the parties and the organisations have made the link themselves.

By the time of the July 2001 IWC Meeting in London, the IWC (or at least the majority of States Parties within it) clearly felt the need, however, to entrench its position. In Resolution 2001-9 (the 'Resolution on Interactions Between Whale and Fish Stocks'), the IWC described itself as 'the universally recognised international organisation with competence for the management of whale stocks'.¹³⁰²

Proposals to downlist whales were made at CITES COPs in all of 1994, 1997 and 2000. The important thing to note about the proposals, of course, is that support for them is at least constant if not increasing. As Komatsu and Misaki write, '[w]hen Japan and Norway proposed

¹²⁹⁸ *Ibid.* See 14.1; esp. at 14.1.3.

¹²⁹⁹ See (n 495).

¹³⁰⁰ A Gillespie 'Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans' Draft article for publication in (2002) 33 *Ocean Development & International Law* 17 at 27. See discussion at (n 494) and (n 495).

¹³⁰¹ 'Resolution on Cooperation Between the IWC and CITES' - 1999-6 IWC/51/43. See (n 503).

¹³⁰² Resolution 2001-9. 53rd Annual Meeting of the International Whaling Commission; see <http://www.eelink.net/~asilwildlife>.

the downlisting of the abundant whale stocks to CITES again in 2000, similar counts of votes as seen in the previous meeting in 1997 were made. Although the proposals did not achieve a two-third majority to qualify the downlistings, the voting counts show that in all cases of proposals for downlisting of the abundant whale stocks, approximately one half of the members of CITES do support our proposals'. This one half, they point out, 'is greater in number than the entire membership of the IWC'.¹³⁰³

It would be difficult to ascribe such a high degree of support to bribery by, or pressure from, the pro-whaling states, as some might do. Komatsu and Misaki offer changing *mores* as an explanation, writing that '[t]he problem of whales is now recognized as a matter that should not be addressed solely by the IWC'; and that '[w]hen we look at the ocean system of the world as a whole, it is inevitable that whales must be studied from the perspectives of multi-species management because of their position at the top of the ocean food web and because of their wide and long ranging migration'. Times, they suggest, have changed 'since whales were considered as species independent from other components of the oceans. Now, the management of whales must be considered in the context of various factors with fisheries in mind'.¹³⁰⁴ The same writers then suggest that since in the IWC a 75% majority is required to amend the Schedule to the Convention, and that it appears that anti-whaling members will dominate and ignore scientific findings for the foreseeable future, it seems unlikely that the IWC will soon decide to lift the moratorium. However, they suggest, 'we can expect to see changes in the IWC, if other international organizations start to recognize the need of proper management of whales, a need which the IWC has so far neglected'.¹³⁰⁵

6.1.7 *The status of whale populations*

Since Norway resumed commercial whaling operations in 1993 'its nationals have taken over 4 000 minke whales from stocks in the northeast Atlantic, despite the passage of several resolutions by the IWC calling upon it to cease commercial whaling activities. At IWC 53, by a vote of 21:15:1, a request was made again that Norway halt whaling operations'.¹³⁰⁶ Norway reportedly hopes to continue with commercial whaling at the rate of approximately 1 000 minke whales every year. Japan and Norway push for such a resumption at every meeting and there is frustration building up.¹³⁰⁷

It has been suggested, for example, that the increasing abundance of the minke whale in the Antarctic Ocean is driving the blue whale from its diet of krill. If this theory were to become substantiated, there would be an 'obvious dilemma for animal welfarists' in the face of potential conservation-based calls for a minke whale cull, per Harrop.¹³⁰⁸

This is actually not a very new argument. Writing in 1980, M'Gonigle suggests that 'general criticisms of [the] MSY [management tool] were underscored for the particular species under consideration in Canberra [at the 1977 IWC meeting], the sperm whale, because of its unique

¹³⁰³ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 154-5.

¹³⁰⁴ *Ibid* at 154-5.

¹³⁰⁵ *Ibid* at 154-5.

¹³⁰⁶ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 201-202.

¹³⁰⁷ 'The harpoons are sharpened' *The Economist* 22 May 2002; www.economist.com.

¹³⁰⁸ S R Harrop 'The Dynamics of Wild Animal Welfare Law' (1997) 9:2 *Journal of Environmental Law* 287 at 288.

biological and social nature, and the minke whale, because the ecosystem in which it was living had been turned upside-down by the depletion of competitor whale species'.¹³⁰⁹ According to Lapointe, writing more recently, blue whales are one of two great whale species 'that have not yet'¹³¹⁰ rebounded sufficiently from over-exploitation'. As part-explanation he suggests competition for food with minke whales, which he says number 'about a million worldwide'.¹³¹¹

Burton tells us that '[c]hief among the small animals feeding on the masses of Antarctic phytoplankton are crustaceans that resemble but are not very closely related to shrimps and prawns. Their scientific name is *Euphausia*, often anglicized to euphausians, but they are commonly known as krill, a Norwegian name merely meaning 'whalefood'.¹³¹² 'In one day,' he continues, 'a blue whale eats four meals comprising about four tons, which is about eight million krill, and a fin whale eats just under three tons'. This sounds like a great quantity, but Burton (writing in 1973) then goes on to explain that '[t]here were one million whales visiting Antarctic seas each summer; now there are no more than a third of this number' with the original population consuming 'millions of tons of krill, mainly *Euphausia superba*'. With the blue whales, right whales and humpbacks having been almost wiped out, and other species greatly depleted, he argues, there 'must be a vast uneaten surplus of krill, which, according to some estimates, could amount to something like 150 million tons per year'. What, he asks, is happening to this presumed surplus? 'The Southern Ocean', he says, 'is so vast and remote that it is difficult to attempt accurate estimates of the total krill population and so find out whether the amount is increasing. There is a suggestion that other krill eaters, such as the seabirds, penguins and seals, would increase as the whales diminished, but only very recently have we been able to get good estimates of the populations of these animals. We have very little idea of their numbers before whale numbers plummeted but there are some indications that this "krill surplus" is being put to good use'.¹³¹³

It might even be that whale populations in the past were far higher than is presently thought, and even estimated scientifically, to have been the case.¹³¹⁴

Gambell agrees that '[t]here is no doubt that the removal of an excessive number of whales from the world's oceans has had a profound effect on ocean ecosystems'.¹³¹⁵ He has a different take on it to Burton, though. 'In the Antarctic', Gambell contends, 'many of the larger animals compete for krill as a source of food. As a consequence, the depletion of the stocks of the great whale species has had observable effects on the growth and reproduction of other species'. It

¹³⁰⁹ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 151.

¹³¹⁰ Lapointe appears somewhat optimistic with his use of the word 'yet'.

¹³¹¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 80. Lapointe writes that 'gray whales rebounded from a 1946 low of a few thousand in the Pacific to some 26 000 today, higher than their estimated numbers prior to the days of unregulated industrial whaling'. *Ibid* at 101-102.

¹³¹² R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 57-9.

¹³¹³ *Ibid* at 57-9.

¹³¹⁴ 'Whale gene research spawns big waves' 25 July 2003; www.cnn.com/science. In July 2003, it was reported in the media, 'Stephen Palumbi and Joe Roman, of Stanford and Harvard universities respectively, published DNA analysis research in the journal *Science* - suggesting that because of wide variation in whale DNA stocks were in the past much larger than previously thought. Their estimates of pre-hunting stocks suggest North Atlantic populations of 240 000 humpback whales (current population estimate: 10 000), 360 000 fin whales (current: 56 000) and 149 000 minke whales (current: 265 000)'. *Ibid*.

¹³¹⁵ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 82.

also appears, he continues, that ‘the reproductive rates and numbers of other animal groups such as the penguins, seals and fish may also have changed since the 1930s’; and that ‘[w]hat was once a delicate but dynamic equilibrium of competition and coexistence has been profoundly distorted by human intervention’. He concludes with the argument that we cannot with any current direct action ‘redress the balance’, and that all we can do now for the time being is ‘watch and wait’ to see if the great whales can recover their ecosystem places.¹³¹⁶

Some writers contend that whales are causing significant damage to ocean ecosystems - and competing with fishermen. Komatsu and Misaki argue that we have, in recent years, gained knowledge of the great amounts of fish which whales consume - and the serious problems which this causes in human fisheries; the authors arguing that whales annually consume between three and five hundred million tons of fish, and that this is equivalent to three to five times the annual amount (approximately one hundred million tons) taken by humans.¹³¹⁷ ‘On the other hand’, the authors suggest, ‘the Japanese fishing production has been reduced to a half of what it was 20 years ago. There is a strong case that over-protection of whales is causing detriment to the Japanese fishery. In greater perspective, this shows that unilateral protection of an animal at one level of the food web causes great damage to the ocean ecosystem’.¹³¹⁸

The same writers then argue that ‘[w]hile in the Antarctic, the different whale populations are segregated and do not mix’. The area, they say, nearest to the South Pole ‘is inhabited, first, by penguins, then seals, blue whales and minke whales’ and that ‘[t]hese different species compete over krill, thus forming the Antarctic biological ecosystem’. To the north of this, they argue, there are fin, humpback and sei whales; and that ‘it is nature’s way that they should remain segregated’ with this being ‘the wisdom of nature - to segregate is to eliminate competition over food’.¹³¹⁹

The present thesis writer, however, prefers the argument that ‘peaceful creatures’ like whales - the equivalent of the African bush’s herbivores? - live side by side and eat differently ... as do zebra, wildebeest, kudu, giraffe, impala, and other herbivores, on land. These species simply do not compete in ordinary, non-stressed, conditions - eating, as the zebra and wildebeest and impala do, the grass at different levels; and the kudu, giraffe and impala eating leaves at different levels or eating different types. Even in certain stressed conditions, such as at times of drought, the different species tend to cluster together - the advantages of communal living (especially enhanced vigilance) outweighing the disadvantages of competition for food.

There is little agreement on the impact whales have on their ecosystems. Martin tells us that ‘[o]ne theme that runs continually throughout the history of modern whaling is the debate concerning the real impact of whaling’; and that ‘[w]halers and their supporters argued that the extermination of a species was not possible as whalers will not kill species that have reached commercial extinction. The remainder, they argued, breed back to sizeable populations’.¹³²⁰

¹³¹⁶ *Ibid* at 82.

¹³¹⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 7-8.

¹³¹⁸ *Ibid* at 7-8.

¹³¹⁹ *Ibid* at 38.

¹³²⁰ S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 70. See (n 140), (n 1346) and (n 1499).

This is a surprisingly common argument, that species will not become extinct as a species *because* they have become commercially extinct - it would hardly seem, however, to be an ethically justifiable argument.

At IWC 51 in 1999, Japan introduced a paper which used three methods of analysis to estimate the total food consumption by cetaceans in the world's oceans. The paper concluded that total food consumption by cetaceans is three to six times the world-wide marine commercial fish catch. The order of magnitude of consumption by cetaceans, according to Japan, was in the region of 100 million tons.¹³²¹ This argument was rejected by New Zealand; which argued that whales do not compete with humans 'for limited food resources, since baleen whales eat krill, not fish, and sperm whales eat deep water squid and fish'. New Zealand argued that the 'problems of the fishing industry [have] more to do with over-capitalisation and unsustainable catches'.¹³²² The US pointed out that 'there have been fishery conflicts throughout the 20th century, and that there is no scientific consensus that killing whales will increase fish stocks'. 'Man', suggested the US, 'is the primary cause of fish depletion, and now possibly climate change'.¹³²³ The Netherlands agreed with the US and New Zealand, pointing out that '[s]ince some of the whale populations are over-estimated, there is a question over the total consumption, and fish consumed by cetaceans are not all commercial species'.¹³²⁴ Certain other countries, such as Norway, Dominica, Antigua and Barbuda, and St Lucia, argued in favour of the Japanese research having been useful; and having shown the importance of the taking of an ecosystem approach.¹³²⁵

At IWC 53 in 2001, Japan argued again that 'the slow recovery of blue whales', as evidenced by the Scientific Committee's SOWER (Southern Ocean Whale and Ecosystem Research) programme', indicates that competition for prey by minke whales shows the latter species continuing 'to prevail in the Antarctic' and that minke whales 'therefore need to be managed appropriately under the RMP/RMS'.¹³²⁶ New Zealand, supported by Australia, argued, however, that 'there is no scientific evidence of competition between blue and minke whales' over food resources in the Antarctic; and that it is because of their having been 'hunted to the verge of extinction' that blue whales' recovery is slow.¹³²⁷

Komatsu and Misaki argue that an overabundance of minke whales is having a negative impact on other species of great whale. 'Hunting of blue whales', they write, 'was banned in the Antarctic in 1964 and in the Pacific in 1966. However, despite 40 years of protection, the blue whale shows signs of a slow recovery'.¹³²⁸ It is debatable, of course, whether this shows minke dominance; or whether it is another example of fisheries never recovering after overexploitation. To give an idea of just how pitiful is the plight of the blue whale, consider

¹³²¹ IWC 'Chairman's Report of the Fifty-First Annual Meeting' (24-28 May 1999, Grenada) at 31.

¹³²² *Ibid* at 31.

¹³²³ *Ibid* at 31.

¹³²⁴ *Ibid* at 31.

¹³²⁵ *Ibid* at 31-32.

¹³²⁶ IWC 'Chairman's Report of the Fifty-Third Annual Meeting' (23-27 July 2001, London) at 12-13.

¹³²⁷ *Ibid* at 13.

¹³²⁸ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 38-39.

that Hoyt suggests that in the Antarctic whalers killed some 360 000 in the first half of the 20th Century¹³²⁹ - and that we now number their populations in the mere thousands, at best.

Komatsu and Misaki do attempt an explanation as to why it is that, in their view, minke whales inhibit the recovery of blue whales. They argue that a blue whale lives for a maximum of 120 years; that female blue whales reach maturity at roughly the age of 12 and usually have one calf at a time after a gestation period of 11 months - and that, with a 'pregnancy rate of 40 percent', they are slow to breed. 'By comparison', they suggest, 'minke whales breed quickly'; living to be about 50, coming to maturity 'at around age six to eight', having a gestation period of nine months, bearing young each year, and having a pregnancy rate as high as 90 percent; and that the two whale species 'share the same habitat in the Antarctic, feeding on the same krill'. The argument becomes that when blue whales were 'hunted down to depletion', the 'fast breeding minke whales took over the feeding ground'; and that 'with increased availability of food, they rapidly' became dominant. 'It is believed', the two writers claim, 'that this hampers the blue whales' recovery. It is the work of nature that the age at which minke whales, through better nutrition, reach sexual maturity has been lowered to six to eight years, resulting in a higher rate of breeding'. Their final assessment is that it might become 'necessary [to] cull the Antarctic minke whales to an extent where its dominance of the feeding habitat is reduced, allowing blue whales a greater opportunity for recovery'.¹³³⁰

It might be questioned whether this argument makes any sense, however. Would it not make more sense for minke whales to be breeding more slowly as their numbers increase? Further, if there are many more krill - nature 'abhorring a vacuum' and there being less predators on them - then how can there be increased competition? The debate shows the limits of scientific knowledge at the moment - both arguments can be made, and either side could be right. Hence, perhaps, the argument can be made strongly that the precautionary principle¹³³¹ should come into play.¹³³²

Hoyt explains that '[e]cosystem-based management as a management regime grew out of the widely acknowledged failure of single-species management, primarily of fisheries'; and that '[i]t is a management regime that seeks to include all the relevant stakeholders'.¹³³³ He warns, though, that '[i]n recent years, those in favour of marine mammal, shark and other large predator culling, as well as whaling, have sought to use the language and ideas of ecosystem-based management to argue for so-called fisheries protection - killing predators in a misguided attempt to protect commercial fish stocks'.¹³³⁴ 'Culling marine predators and other actions', he

¹³²⁹ E Hoyt *Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation* (2005) at 96.

¹³³⁰ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 38-39.

¹³³¹ See 11.4.

¹³³² Butterworth commented on a draft of this text as follows: '[y]our logic is at variance with basic scientific principles here. If a population is to increase where it has been steady, say, either its birth rate must increase or its death rate decrease. What is posited for the Antarctic is that decreasing the number of large baleen whales allowed their food source, krill, to increase and that minke whales (and other species) took advantage of this by increasing their birth rates and growing. It is then the greater numbers of these species which, through the further krill they now consume, inhibits the recovery of the species such as blue whales originally depleted by whaling'. Email from D Butterworth to E Couzens; 28 June 2008.

¹³³³ E Hoyt *Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation* (2005) at 4.

¹³³⁴ *Ibid* at 4.

concludes, ‘that seek to manipulate, disturb or destroy the ecosystem have no place in ecosystem-based management’.¹³³⁵

Butterworth told me that the assessment was made originally to explain unusual age patterning in minke whales, based on analysis of ear plugs. I put to him a question about minke whales breeding at a lower age, and advised that it made little apparent sense to me. The issue, he said, is ‘still controversial’; but the basic line is that there are two ways to discern the age of maturity in whales, the first being to catch the animals and examine the females’ reproductive organs. Secondly, he explained, age of maturity:

has been correlated to something in the ear plugs ... which lay down like trees, you have layers each year ... what happens is ... they’re initially widely spaced to become narrowly spaced ... and the reason for this is at a certain stage the skull stops growing ... not much space for this ear plug to expand in as it goes up ... and this is correlated with the age at which they become mature ... the idea is that if there’s more food available they grow faster so they reach this age earlier ... and the question is, is this a major factor in the way the population controls itself ...¹³³⁶

He then explained that there are various features that control population rate, and that this potential factor needed to be considered; and that, when this data was first considered, a decrease in the age of maturity was apparent:

from about 1950 to 1970 ... remember, no minke whales had been caught then ... you could only pick this up because we were catching minke whales in the 70’s and 80’s, and you could tell, if you got a 40 year old minke in 1980 ... you knew it was born in 1940 ... and from the transition phase of the ear plugs when it became mature ... at age seven or eight or ten ... the picture that came out of this was that in 1950, which is about as far back as you can take this reliably, they were becoming mature at age eleven ... and by 1970’s they were becoming mature at age seven ... and since then it’s stabilised - and this is direct observation from transition phase - it has gone up slightly recently ... but stabilised again ... in simple terms, it was at eleven, it came down to seven by 1970, it then went up a bit to eight by roughly 1980, and then it stabilised for the last 20 years ...¹³³⁷

‘The argument about minke whales’, Butterworth continued, ‘is that minke whales were originally much smaller in numbers’ but that the ‘taking out’ of all of the bigger whale species - which had been competitors for krill - gave the minkes the opportunity to expand. By the 1960s, he said, all of the big whales had had ‘the guts knocked out of them’ and that that was the time at which the minke whale population ‘exploded’.¹³³⁸

However, at IWC 55 in 2003, the Scientific Committee ‘agreed that reliable age determination beyond the first few years was not possible using tympanic bullae’; and recommended that the Commission not agree to include in the Schedule a requirement on collecting bullae.¹³³⁹

Continuing with Komatsu and Misaki, they tell us that ‘[a]t the Indian Ocean Tuna Commission meeting in 1999, discussion was extended to cover the subject of damages to the fisheries by whales. When the meeting heard about the magnitude of the whales feeding on

¹³³⁵ *Ibid* at 4.

¹³³⁶ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens. Butterworth has advised that this information is contained in the Report of the December 2006 JARPA Programme Review by the IWC SC (which is a public document). See 6.1.7; and (n 1093) and (n 1343).

¹³³⁷ *Ibid*.

¹³³⁸ *Ibid*.

¹³³⁹ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 17. Butterworth commented on the present text here as follows: ‘[b]e careful not to confuse two different issues: there are two ways argued to estimate whale ages - layers in ear plugs and bullae - it is only the latter which is excluded here’. Email from D Butterworth to E Couzens, 28 June 2008.

fish, and the scrapping of the tuna vessels in an effort to reduce the impact of fishing to conserve fish resources, the majority of the participants concurred that it is irrational that whales are protected unilaterally'.¹³⁴⁰ This is an argument, again, for increasing support for a usage philosophy.

'In August 2003', Komatsu and Misaki record, 'at a symposium held in Yokohama, Dr Hidehiro Kato of the National Institute of Far Seas Fisheries advised that the blue whale has decreased to approximately 1 000 animals (from 200 000 early in the 20th century)' and that this was due to 'excessive harvesting'.¹³⁴¹ Kato apparently advised further that '[a]lthough blue whales and minke whales are different in size, both belong to the Balaenoptera family and migrate to the ice edge area of the Antarctic in their feeding season to consume krill. In other words, they occupy the same ecological niche and compete over the same kind of food'. '[T]he minke whale', Kato apparently continued, 'is [by contrast] found in robust stock condition. Because of the alleviated competition with the blue whale over food due to the latter's depletion, minke's trophical conditions improved and maturity age has been lowered, leading to increase in the population'. Kato then estimated 'that the minke's maturity age has been lowered since around 1940s'.¹³⁴²

This is another formulation of the suggestion that the minke whale's age of reaching maturity has lowered because of the species' increased population. It is important as an example of the arguments raised by the pro-whaling camp; and of this camp's general mindset. However, in the present writer's view it has little biological credibility. In healthy populations, maturity ages do not decrease.¹³⁴³ It is when populations are stressed - or, as in elephants, when there are insufficient adult animals - that maturity ages lessen. That the argument is raised is, however, extremely interesting given that at CITES meetings from 1989 the Zimbabwean representative, Rowan Martin, was ridiculed for suggesting (as an indication of stock health) that elephants in Zimbabwe were breeding at a younger age than had ever been recorded elsewhere.¹³⁴⁴

6.1.8 The 'ecosystem' approach

Komatsu and Misaki state that 'it needs to be questioned how it is possible to manage all species of whales, which have different populations, as one unit;' and that '[e]ven so, there are still only 13'¹³⁴⁵ species of whale under the management of the IWC'. Japan, they suggest, 'continues to support full protection of those species that were depleted and are slow to recover'. However, they suggest that it 'remains necessary to promote the rational

¹³⁴⁰ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 155.

¹³⁴¹ 'Blue Whales and Minke Whales Compete over Food in the Antarctic' *JWA News* No.8, December 2003 http://www.whaling.jp/english/news/0312_01.html.

¹³⁴² *Ibid.*

¹³⁴³ Butterworth commented on the present text as follows: '[y]ou are at variance with much scientific evidence here.

Decreased age at maturity is one of the mechanisms populations use when reduced to get birth above death rates so that they can regain original abundances. Dropping the age at maturity gives an effective increase in average birth rate in the population, and lower age at maturity is an expected response to the greater food availability at lower numbers which allows the animals left to grow faster individually and hence mature earlier'. Per email from D Butterworth to E Couzens; 28 June 2008. See 6.1.7; and (n 1093) and (n 1336).

¹³⁴⁴ A Thornton & D Curry *To Save an Elephant: The Undercover Investigation into the Illegal Ivory Trade* (1992 (1991)) at 210.

¹³⁴⁵ It is unclear why Komatsu & Misaki give this figure - in the original 1946 "Annex of Nomenclature" to the ICRW, 16 species were listed - and the orca (killer whale) has since been added to the list. See (n 100).

management of whales on a stock-by-stock basis. By doing so, mankind is able to use the wealth of the ocean in a sustainable manner. Protection is not the only choice for the management of marine resources. ... Ultimately, ... it needs to be kept in mind that no species of whale has become extinct through human exploitation'.¹³⁴⁶ It must be asked, though, whether this view is consistent with the writers' own professed view that whales should be managed as components of their ecosystem rather than as single stocks or species? It would seem not, which implies that such argument might be being made expediently.¹³⁴⁷

Glavovic argues that marine ecosystems cannot be seen, or managed, in the same way as land ecosystems; with the demarcation of boundaries being more open and difficult to define because of the nature of the ecosystems of coastal and marine areas. He explains that marine areas 'have horizontal and vertical components, both of which should be defined, but the seaward boundary may be jurisdictionally confined to territorial waters although it may be ecologically desirable for it to extend to the edge of the continental shelf or beyond'; and that boundaries become 'almost irrelevant' for the management of 'biological resources within the reserve' as 'species in a marine reserve area would spend much of their lives outside the reserve'. He suggests that ecosystems can be defined physically on land, not in the sea; explaining that 'the migratory nature of most marine fish and mammals make it almost impossible to define the physical limits of marine ecosystems' and that 'direct protection of individual species is a role of terrestrial protected areas' but an unrealistic expectation for marine reserves. He concludes that marine protected areas cannot be expected to play the same sort of preservationist role as on land; and that nor, 'logically, can there be the same sort of controls over resource exploitation'; and that the 'protectionist philosophy applied to resource management on land has very limited application in the protection of marine resources'.¹³⁴⁸

Komatsu and Misaki write that Japanese 'fish production' stood at more than '12 million tons a year at its peak in the 1980s;' but that '[i]t is currently down to one-half - about six million tons'.¹³⁴⁹ It is unclear what the writers mean by 'fish production'; presumably fish harvesting is meant. They conclude, from these cited figures, that 'while the fisheries halved, the whale population doubled'; and that while '[t]his may seem too simplistic, it tells us of the fundamentals of the competition between the human fisheries and the whale population'. They suggest that many anti-whaling exponents argue that '[i]t's nonsense that the Japanese attribute the decline of fish populations to the increasing whale populations'; and that such organizations 'always say the decline of fish population is only due to the human over-exploitation of fish and not of whales'. Japan, however, has, they say, 'been laboriously endeavoring to scrap the fishing vessels - at the price of distressed fishermen - entirely because

¹³⁴⁶ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 36-37. See (n 140), (n 1320) and (n 1499).

¹³⁴⁷ Butterworth commented on this section of text as follows: '[y]ou are confusing two different issues. The Komatsu and Misaki argument is against whale management that lumps all species together and treats them the same whatever their different population status might be - eg: the blue whale unit concept, or the moratorium, which hardly or don't distinguish species. The counter-argument is to, say, take different proportions of blue whales and humpback whales if the one is at a low and the other at a high level. When one comes next to the exact proportion for a particular species, that might be computed also taking ecosystem factors into account rather than a purely single-species model based computation'. Per email from D Butterworth to E Couzens; 28 June 2008.

¹³⁴⁸ P D Glavovic *Wilderness and the Law* (1995) at 25. Glavovic adds that '... [a]nother important role of protected areas is to conserve critical habitats. The problem in the sea is that there are transient critical habitats, with shifting positions and no fixed boundaries, as well as fixed critical habitats such as coral reefs'. *Ibid* at 25.

¹³⁴⁹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 126-127.

of the conservation of the fish resources'.¹³⁵⁰ The Japanese argument, then, according to these writers, is that they are *not* overfishing; but in fact that they are reducing their catch. 'Humans', according to Lapointe, concurring, 'take a lot of fish, but in many cases, their industry is not the principle reason for fish depletion. Leading-edge conservationists take a holistic, multi-species approach to management, working with whole ecosystems. The policies that result are consistent with the laws nature has created for itself'.¹³⁵¹

The possibility remains, though, that other countries are overfishing on the Japanese behalf - Japan does appear to import large quantities of fish.¹³⁵² This is not conceded by Komatsu and Misaki, who argue that '[w]hile the nation is enforcing the radical retrenchment of vessels, we are letting the whales go wild consuming the marine food resources'.¹³⁵³ They ask '[h]ow much of the various species of fish are whales eating around the world?' and answer that, '[i]n theory, the figure obtained by the ICR, in Tokyo, is staggering'; with the 'total feeding volume by whales worldwide [being] calculated to be in the range from 280 million tons to 500 million tons'. By comparison, they argue, '[a]ccording to the FAO statistics, the total volume of fish caught by humans worldwide is around 90 million tons'.¹³⁵⁴ Many anti-whaling advocates, continue Komatsu and Misaki, 'including the officials of the United States Marine and Fisheries Service and the Environmental Ministry of Australia, assert that declining fish resources are a result of the human fishery, and not attributable to fish consumption by whales'.¹³⁵⁵ The argument, therefore, at least impliedly, is that it is because of an anti-whaling bias that certain parties refuse to recognise that whales are competing significantly with human fishers and are overeating fish stocks.

'In the proper multi-species management strategy', argue Komatsu and Misaki, 'one particular species should not be over-exploited alone, nor should it be unilaterally protected in disregard of conservation of other species'. They suggest even that utilisation of as many species as possible is desirable, within the limits of population growths of stock; since, in such a strategy, it might become apparent that some species 'deserve further protection, while others may deserve culling to restore the balance in the eco-system'.¹³⁵⁶ Whales, they suggest, are currently eating 'three to five times as much marine species as taken by human fisheries'; and that 'if we ignore this fact in our management of fisheries, our fisheries management would soon end in failure'.¹³⁵⁷

One might reasonably ask, however, whether it is right - both ethically, and in scientific legitimacy - to compare human use to whale use. Humans, after all, can hardly be seen as naturally being systematic predators of fish - in the same way as chimpanzees are not habitual fishers - and whales being creatures that fit into marine ecosystems because of many hundreds of thousands of years of evolution and natural selection; whales also having no choice, unlike humans, but to eat fish.

¹³⁵⁰ *Ibid* at 126-127.

¹³⁵¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 36.

¹³⁵² See 11.3 on overfishing generally.

¹³⁵³ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 126-127.

¹³⁵⁴ *Ibid* at 127-128.

¹³⁵⁵ *Ibid* at 128.

¹³⁵⁶ *Ibid* at 129.

¹³⁵⁷ *Ibid* at 129-130.

Komatsu and Misaki argue that it is possible rationally to manage fish resources only ‘once the pre[y]-predator relationship of whales and other fish is taken into account’ - the marine ecosystem of the waters off Japan being complex and containing many other species.¹³⁵⁸ The same writers then argue for balancing the economic and ecological taking of whales and tuna. ‘Tuna’, they contend, ‘has been liberated for import and the Japanese market is deluged with the imported tuna’; and claim that if minke whales could be taken instead of tuna, the market for tuna could be reduced or replaced. This, they say, would also ‘answer the question of rational management of the marine ecosystem, in that all possible growing marine species are evenly utilized’.¹³⁵⁹ These comments about a ‘deluge’ of tuna do, of course, support the present writer’s suggestion that even if Japanese fishermen are not *themselves* overfishing, by importing fish caught by other nations the Japanese are responsible for overfishing.

It has been suggested that in the 1950s marine mammals in the ocean were eating seven times more fish than was being caught by humans - a ratio which fell to three times in the 1990s, because of increased human catches and falling numbers of marine mammals. When only the types of fish taken by human fisheries are considered, however, it seems that marine mammals and human are currently on about par. This, suggest Pauly and Maclean, seems to indicate that ‘some fishers and fisheries managers are using marine mammals as scapegoats for their own mistakes’.¹³⁶⁰

Japan argued at IWC 51 that ‘the [FAO] has reported that 35% of the world’s major fishery resources are over-exploited and a further 25% are exploited to their full capacity’; and that the FAO, also, has emphasized the need to manage resources with an integrated ecosystem or multi-species management approach’. Despite this, according to Japan, ‘the IWC continues to impose a blanket protection of whales, irrespective of stock status of whales and disregarding science’.¹³⁶¹

IWC 53 in 2001 saw a rare example of the US and Japan working together openly and jointly,¹³⁶² introducing a Resolution which, *inter alia*, stated that the IWC ‘as the competent international organisation for the conservation and management of whales’ had decided to prioritise the study of interactions between whale and fish stocks; that ‘any studies conducted by the FAO on ecosystem-based fisheries management’ should be ‘holistic and balanced in approach’; that there should be a workshop, as recommend by the Scientific Committee; and that the Secretary be requested to seek cooperation with FAO ‘in the organisation and conduct

¹³⁵⁸ *Ibid* at 129-130.

¹³⁵⁹ *Ibid* at 130-131. Consider, for example, the following explanation from Komatsu and Misaki: ‘[w]e are concerned that some tuna stocks such as the bluefin and Southern tuna are over-fished. These are the particular kind of tuna that are suitable for *sashimi* (raw fish) servings. Anti-fishing advocates assert that Japan is the culprit of the decline of tuna resources. They attribute the Japanese market for taking so much tuna fished by the foreign tuna fishermen. Then, why do the foreign tuna fishermen take so much tuna? Because they can earn money by selling catches to Japan. So they assert the culprit is Japan. An effective answer to this anti-fishing assertion would be to limit the import of tuna’. *Ibid* at 130-131. The logic of this seems extremely convoluted, at best.

¹³⁶⁰ D Pauly & J MacLean *In a Perfect Ocean: The State of Fisheries in the North Atlantic Ocean* (2003) at 56-57.

¹³⁶¹ In its Opening Statement Japan said that:

[r]ecent investigations show that approximately three to five hundred million tons of marine food resources are consumed annually by cetaceans, some 3 to 6 times more than are fished for human consumption. While in 1998 the FAO called for a 30% reduction in the number of fishing vessels or fishing effort as part of urgently require[d] improved fisheries management measures, the demands of an increasing human population in the next century also require that we consider integrated ecosystem management for the use of all marine living resources. For these reasons, the total protection of whales for emotional or political reasons promotes imbalance of the marine ecosystem and may possibly destroy a part of the ecosystem.

Written Opening Statement by: Japan (IWC/51/OS/JAPAN).

¹³⁶² See 17.1.

of this workshop'. The US, however, did note that it remained opposed to Japan's scientific whaling; in the belief that whale and fish stock interactions can be studied without lethal research whaling.¹³⁶³ The Resolution was adopted by consensus; although a number of countries did express concern. In particular, the Netherlands and Austria were 'sceptical' of claims that whales 'are causing harm to commercially important fish stocks'; with the Netherlands 'noting' the 'simplistic nature of the arguments proffered'.¹³⁶⁴ A number of countries also 'expressed concern' over the wording recognising the IWC as *the* 'competent international organisation' for the conservation and management of whales; Norway, in particular, considering this claim 'not to be in accordance with UNCLOS Article 65'.¹³⁶⁵

In June 2002, Akira Nakamae, councillor of the Fisheries Agency of Japan, apparently claimed that '[a]nti-whaling countries ... ignore the magnitude of the problem of fish consumption by whales. It is widely known that whales consume three to five times the amount of marine resources harvested for human consumption'.¹³⁶⁶ If true, this is an alarming statistic as the worldwide annual fish catch is probably currently in excess of 100 million tonnes. 'Alarming' it is, but it must be put into context. Whales excrete and die and feed other species, and alter krill populations; and, importantly, there are many hundreds of thousands fewer whales than in the pre-whaling era.

Lapointe argues along the same lines as Nakamae; contending that only 'when all species in an ecosystem are sustainably managed' can fish stock conservation 'be possible'. Under such conditions, he suggests, 'non-human predators can no longer exert undue effect on the prey that both they and humans utilize'. He comments that 'over-protecting predators of certain fish species, such as marine mammals, is as damaging for the ecosystems and for conservation as over-harvesting the same fish species by humans'. 'Like over-harvesting', he concludes, 'over-protecting is not conserving. To the contrary, both activities work against conservation'.¹³⁶⁷

This is, of course, a difficult argument to refute - that species should be extracted from ecosystems equably. However, what it is presupposing is that significant quantities will be extracted. The solution might well prove to be the extraction of less overall rather than increasing the take, albeit taking more equably.

'Just as on land', continues Lapointe, 'when predator numbers grow greater than the predator-prey equilibrium formula, and prey species begin to disappear, so too in the oceans, equilibrium is lost when there are too many whales or sea lions, seals or sharks. The entire ocean ecosystem suffers. Ironically, it is the spirit of saving a single species that threatens the survival of many other species'.¹³⁶⁸ It is questionable whether this is indeed correct. This, after all, is what James Stevenson-Hamilton believed in the early days of the Sabi Game Reserve and which led to his waging an extermination campaign against predators ... but which proved

¹³⁶³ IWC 'Chairman's Report of the Fifty-Third Annual Meeting' (23-27 July 2001, London) at 31.

¹³⁶⁴ *Ibid* at 31.

¹³⁶⁵ *Ibid* at 31. At IWC 54 in 2002 it was reported that, although attempts had been made to hold such a workshop, it had not occurred due to the difficulty of getting parties together. IWC 'Chairman's Report of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki) at 38-39. See Annex D.2.3 on Article 65.

¹³⁶⁶ 'Japan rebuts whale sanctuary at Pacific Island legislators' meeting' *JWA News* No.2, August 2002

http://www.whaling.jp/english/news/0208_01.html.

¹³⁶⁷ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 11-12.

¹³⁶⁸ *Ibid* at 15.

eventually to be incorrect and flawed as a management tool.¹³⁶⁹ Lapointe's argument may well be similarly flawed.

Severin has asked how, given that '[a] world authority on sperm whales, Malcolm Clarke, calculated that a single male sperm whale requires fifteen tons of food every day, and the smaller females need five tons', the world's sperm whales can find enough squid and other food to sustain their huge bulk?¹³⁷⁰ Burton writes that '[a]t the southern (*sic*) of the sei whale's range, along the fringes of the ice pack, its food, and that of the other whalebone whales, is mainly krill, *Euphausia superba*'; but that '[e]ven here, diet is not uniform'. According to Burton, the blue whale eats krill with body lengths of 20-30 millimetres, the fin whale eats older krill with 30-40 millimetres length, and the minke eats smaller krill of 10-20 millimetres long'.¹³⁷¹ Humpback whales, he says, have been recorded eating all of krill, lobster krill, squid and fish; while minke whales eat krill, copepods and fish, including bottom-living dogfish; and Bryde's whale will even eat small sharks, along with sardines and anchovies. The blue whale, Burton tells us, is however more restricted in its diet than are the others; with the blue whale concentrating on eating krill.¹³⁷²

As with plains game on the African savannah, then - there is an intricate web. This might well provide an answer to the Japanese charge that the minke whale is overeating to the detriment of other great whale species.

It is both a traditional and a new theme that whales are eating 'too many' fish. Mulvaney and McKay write that '[a]lmost without exception, conflicts between fisheries and marine mammals of all kinds take place whenever and wherever the two co-exist'.¹³⁷³ This, Donoghue says, has the 'added attraction of providing a scapegoat for the overfishing of marine resources that has resulted in dramatic declines in several important commercial fish stocks, particularly in the Northern Hemisphere'.¹³⁷⁴

The same writer points out that '[i]t [has been] argued that recovering populations of whales will threaten global food security by distorting the marine food chain',¹³⁷⁵ and explains that, at IWC 41, Norway claimed that '[t]he interactions between minke whales, seals and other living marine resources is a question of vital importance to Norway where the dependence on the total ecological balance in the seas off Norway is essential in the long term' and that '[f]or Norway, the multi-species research approach is a critical research need'. This position, says Donoghue, 'laid the foundation for two arguments that would be used frequently in the future

¹³⁶⁹ P Meiring *Behind the Scenes in Kruger Park* (1982) at 23. It seems that all predator species were culled initially, in an effort to enable populations of prey species to increase; and lions and hyenas were culled until 1980. See F J Venter, R J Naiman, H C Biggs & D J Pienaar 'The Evolution of Conservation Management Philosophy: Science, Environmental Change and Social Adjustments in Kruger National Park' (2008) 11 *Ecosystems* 173 at 179 (table).

¹³⁷⁰ T Severin *In Search of Moby Dick: Quest for the White Whale* (1999) at 224.

¹³⁷¹ R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 63.

¹³⁷² *Ibid* at 64.

¹³⁷³ K Mulvaney & B McKay 'Small Cetaceans: Status, Threats, and Management' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 189 at 195.

¹³⁷⁴ M Donoghue 'Whales - The New Scapegoat for Overfishing' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 383 at 383. Donoghue gives as examples Newfoundland cod, North Sea haddock. *Ibid* at 383.

¹³⁷⁵ *Ibid* at 384.

by whaling countries, namely that whales distort marine ecosystems, and that research into fisheries' interactions is a critical research need for the IWC'.¹³⁷⁶

Stone suggests that it is 'not unthinkable' that eventually the IWC might have to consider the effect of whales on human food security. The 'ugly, little discussed fact', he says, is that marine mammals, 'probably whales in particular, compete with humans for fish on an unclear but clearly huge scale'. He then cites Japan as estimating, in its opposition to the Southern Ocean sanctuary, that 'whales in the Antarctic region alone currently consume 240 million tons of feed annually'.¹³⁷⁷ Stone then asks whether 'an expanding humanity in the mid-twenty-first century' might not become 'tempted to regard whales as ranchers do wolves - with public sentiment shifting accordingly'. And, he says, 'might we not someday be looking to the IWC to - flexibly - account for food needs by culling out excess competition?'.¹³⁷⁸

An eminent commentator, Stone - and no hardline supporter of the use of natural resources. The present writer's answer would be that by the time it comes to the stage he describes, the greater collapse of fisheries generally will have made it obvious that turning to eating whales would itself be only a short term solution. Much will have changed by the 'mid-twenty-first century'.

Donoghue explains that the complexity surrounding feeding interactions makes predicting outcomes for even the most basic trophic web very difficult; and that '[m]odels of multi-species interactions have shown that expected outcomes are rarely met' for the reason that 'each trophic level is affected by a mix of competition, predation and environment, the importance of each varying with the species concerned'. Potential interactions between predators and prey in even simple ecosystems, he continues, 'make predictions highly uncertain'; and advises that '[i]t is not surprising that there is little scientific consensus on the reliability of multi-species fisheries' models to predict the impact of cetaceans on fish stocks'.¹³⁷⁹ He then points out that cetacean biomass, particularly of baleen whales, has been so depleted that in the Southern Hemisphere, the total biomass of baleen whales was estimated in 1988 to be 'between 4 and 8 percent of their biomass in 1900'; and draws the conclusion from this that '[e]ven if fish were their main prey, such greatly reduced populations are unlikely to have any significant adverse impact on fish stocks'.¹³⁸⁰

Drawing from these figures, the question should be asked whether minke whales have become so numerous that they now outnumber the combined total of all great whales before most of them were killed. This does not seem likely.

Freeman argues that 'all fishery regulatory bodies will ultimately adopt an ecosystem approach to management'; meaning an approach which 'will compel them to address the predatory impacts caused by growing whale populations that, in some cases, are known to be

¹³⁷⁶ *Ibid* at 385-87.

¹³⁷⁷ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 271-72.

¹³⁷⁸ *Ibid* at 271-72.

¹³⁷⁹ M Donoghue 'Whales - The New Scapegoat for Overfishing' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 383 at 389-90.

¹³⁸⁰ *Ibid* at 390.

increasing at rates greater than 10 percent annually'.¹³⁸¹ This is the Japanese view, but supported here by a 'Western' commentator. Iino and Goodman agree; writing that '[c]ompetition between marine mammals and fisheries is now a serious concern for nations dependent on fisheries, as well as for a number of global and regional fisheries management organizations, including the FAO, which have urged the development and implementation of ecosystem approaches to the management of marine resources'. Various international documents, such as Agenda 21, they suggest, 'call for the promotion of an ecosystem approach to the management of marine resources'.¹³⁸² What this does imply is that the 'ecosystem approach' has been deliberately linked with the idea of removing competition from whales.

It is extremely ironic how use of the term 'ecosystem approach' has shifted between the protagonists. In the late 1970s, Scarff could write that '[t]he need for cetacean management based on ecological principles ... is not merely an idealistic refrain, but a matter of immediate and practical necessity'.¹³⁸³ By this he meant that preservation was needed - by way of a moratorium - and the ecological ground was that whales desperately needed to be given time to recover, if they could.

Asked about this in early 2007, Donovan, however, felt that this debate is 'part of a much broader problem ... and that it had become a mantra to talk of an ecosystem approach'; and that 'nobody really knows what it means, ... you get quite a lot of disagreement over what it means'.¹³⁸⁴

Birnie writes that '[e]cologists urge recognition [] of the fact that mammals are not always top predators in the marine areas they inhabit but are often multi-level species, different species of them themselves taking one or more of the other levels - plants, benthos, zooplankton, squid, fish, birds, seals, small and even large cetaceans'. The significance of this, she says, is that if one 'trophic layer of an ecosystem is harvested', she gives whales, krill, harp seals and capelin as examples, the consequence might be that layers dependent on the layer being harvested cannot themselves be harvested, or not to their full extent. She then suggests that some scientists have urged that the management of such resources should be based 'on the results of ecosystem case studies, which should integrate available knowledge of the different species, and on an understanding of their interactions within the marine ecosystems'. It is possible, though not proved, she says, that 'full recovery of formerly over-exploited species now fully protected may be hampered by expansion of other populations during moratoria on whaling'. This approach, she concludes, presents 'formidable difficulties for any management body since it requires the operation of a complex conservation policy without offering clearly quantified, or even (it is said by some) quantifiable criteria for its formulation'.¹³⁸⁵

¹³⁸¹ M M R Freeman 'Culture-Based Conflict in the International Whaling Commission: The Case of Japanese Small-type Whaling' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 33 at 33.

¹³⁸² Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 11-12.

¹³⁸³ J E Scarff 'The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)' (1977) 6 *Ecology Law Quarterly* 323 at 412.

¹³⁸⁴ Personal communication Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

¹³⁸⁵ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 8.

It is interesting that Birnie, writing in 1985, thus presaged the present argument that whales ‘overfish’. However, her suggestion points also to the sheer complexity of the systems which humans make predictions about - it seems not to be significantly easier today to make accurate predictions than it was in the mid-eighties.

The present writer put it to Kleinschmidt that at the same time as we appear to be moving toward more holistic understandings, it is odd to see whaling as an almost entirely separate issue. He agreed that it was odd, and described it as another reason why the IWC is ‘out of step’ with ‘the next chapter in marine management’. ‘Our grasp’, he said, ‘of the ecosystem approach is so wanting ... it’s not in step, and therefore you’ve got to look at the ecosystem pyramid ... and understand how it is that you need a top predator, whether it’s a shark or ... you can’t just say we’ll remove something here, and then it’s got a rippling effect on everything else’. He concluded that nobody knows what it is that causes animals, especially smaller animals, sometimes not to recover from disruptions to their populations - but that it appears to be human intervention ‘that cuts such a strong slice out of this pyramid that ... and I think that it’s in that context that in the end whales need to be seen ... and I don’t think we’ve got a clue what their role is ...’.¹³⁸⁶

6.1.9 Further downlisting proposals

At CITES COP 11, in 2000, Norway pushed again for a downlisting of the minke whale. In the lead-up to the COP, the High North Alliance pointed out that Resolution 2.9 from 1979 does not oblige CITES to follow the IWC; rather, that the Resolution ‘only recommends the parties not to issue any international trade permit for whales protected by the IWC’.¹³⁸⁷ The HNA pointed out also that CITES did not, in the 1980s, follow IWC decisions automatically. The example chosen to illustrate this point is, however, ironic - given that CITES afforded *greater*, not less, protection to species such as fin, sei and Bryde’s whales (listing them on Appendix I even while the IWC was still issuing quotas). The HNA uses a better example when pointing out that in 1983 CITES kept the West-Greenland minke whale on Appendix II, on the basis that the species was not subject to an aboriginal subsistence hunt.¹³⁸⁸

Having received opposition early on, on the last day of the Conference, Norway even called for a reopening of the debate and amended its proposal with further DNA-based identification strictures to ensure that trade was undertaken only with countries where such identification systems were implemented. Several delegations opposed the proposal, arguing that

¹³⁸⁶ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. Kleinschmidt clarified what he meant by explaining that what he had wished to convey with his comments was that the environmental concept of sustainability is often misused. By way of example, he explained that if there were once 1-million whales then the sustainability model might say that we can kill 100 000 of them annually, and their reproduction, according to available evidence, will maintain (sustain) them at the 1-million mark. However, we do not have 1-million whales - all we know is that we have a fraction of the former numbers. This does not, he said, stop mathematical modellers from saying: ‘we have worked out how many you can kill per annum to keep the current numbers at x or y ’; but they do not know how many whales there are, and they have to work on supposition. Kleinschmidt then explained that his argument was twofold: firstly, that the degree of human engineering of biodiversity is wrong, because we work from the low base created by whalers over the past 150 years. ‘Why’, he asked, ‘is this low base good or correct for our environment?’ Secondly, that mathematical modellers rely on ‘figures’ that are questionable; as, in contrast to animals on land, our knowledge of numbers (and much else) in the oceans remains scant. *Personal communication* Email from H Kleinschmidt to E Couzens, 11 August 2008.

¹³⁸⁷ High North Alliance ‘Trade in minke whales - conservation in action: Downlisting North Atlantic minke whales at CITES, 10-20 April, 2000’ (2000) at 5.

¹³⁸⁸ *Ibid* at 5.

downlisting the minke whale would amount to resuming commercial whaling. The proposal was voted on in secret ballot and again failed to reach the required two-thirds majority for downlisting. Once more, however, votes in favour outnumbered votes against - 53 votes being cast in favour of the proposal, with 52 against and eight abstentions.¹³⁸⁹

In 2001, at the IWC meeting, Resolution 2001-5 (the 'Resolution on Commercial Whaling')¹³⁹⁰ expressed concern that 'the Government of Norway, having lodged a reservation to the CITES Appendix I listing of whales, has announced its intention to resume international trade in minke whale products despite the decision by the CITES Conference of Parties in 2000 to support the continued listing of minke whales on Appendix I'. Resolution 2001-5 then 'requested' that the Norwegian government issue no export permits for whale products, 'called upon' the same government to 'halt immediately all whaling activities under its jurisdiction,' and 'instructed' that a copy of the Resolution be forwarded to the CITES Secretariat.¹³⁹¹ Increased and increasing linkage between the IWC and CITES seems to be a fact.

6.1.10 CITES COP 12, 2002

CITES COP 12 saw the whaling debate resume. The government of Japan officially submitted proposals to the CITES Secretariat for changes to the classification of Northern hemisphere minke whales and Northern Pacific Bryde's whales. Japan proposed downlisting both species from Appendix I to Appendix II.¹³⁹² Neither proposal was approved. Clearly, though, the playing off of CITES against the ICRW/IWC was continuing.

Arising from CITES COP 12, it was reported by *ECO News* that '[c]ountries in favor of conserving minke whales and Bryde's whales won two votes at the [CITES meeting] today, turning down proposals by Japan to transfer these two species to a lower level of protection under the treaty'. Some degree of bias is certainly inherent in this description, with the word 'conservation' being used to mean preservation. Voted on, the proposal to downlist minke whales failed by a margin of 41 votes in favor, 54 against, five abstentions, and six spoiled votes. The Bryde's whale proposal failed also with 43 votes in favor, 63 against, three abstentions, and two spoiled votes. The Parties, said the report, must accept these results in the meeting's plenary session late next week before they will become final'. Of interest, the same report recorded that all of Benin, Cuba, Dominica, Greenland, Grenada, Côte D'Ivoire, Senegal and Zimbabwe 'voted with Japan, on the basis that the whale stocks are abundant and whaling supports the livelihoods of poor coastal populations'.¹³⁹³ Clearly, it is of significance for the linkage of species and conventions that Zimbabwe voted - and voted as it did.

¹³⁸⁹ See, for instance, 'COP 11: Whales' *UK CITES News* [http://www.ukcites.gov.uk/news/old/default_copy\(1\).htm](http://www.ukcites.gov.uk/news/old/default_copy(1).htm).

¹³⁹⁰ Resolution 2001-5, 53rd Annual Meeting of the International Whaling Commission; see www.eelink.net/~asilwildlife/53IWC.html.

¹³⁹¹ Resolution 2001-5 also referred to Resolutions 1994-7, 1995-6, 1996-3, 1997-2, 1998-8 and 1999-6 which were all 'welcoming' of 'the continuing cooperation between CITES and the IWC on issues related to trade in whale products'.

Resolution 2001-5 'Resolution on Commercial Whaling'
<http://www.iwcoffice.org/Meetings/resolutions/resolution2001.htm#5>.

¹³⁹² 'Japan to propose downlisting of minke, Bryde's whales at CITES' *JWA News* No. 2, August 2002
http://www.whaling.jp/english/news/0208_01.html.

¹³⁹³ 'CITES: Nations vote to protect minke, Bryde's whales' *CDNN Eco News* 9 November 2002
<http://www.cdnn.info/eco/e021109/e021109.html> (accessed 29 July 2006).

According to the same *ECO News* report, all of ‘Canada, Chile, the European Union, Georgia, Mexico, India, Israel, the United States and the International Environmental Law Project, among others, opposed Japan’s proposals, on the basis that a lowered level of protection would cause enforcement problems’. Australia apparently pointed to problems that might arise in distinguishing between healthy and endangered whale stocks.¹³⁹⁴

The specific allegation was even made that Japan had been trying to undermine the IWC with its motions at CITES. In the same report, one Kitty Block, described as an international lawyer for the Human Society of the United States, was quoted as saying that ‘Japan was unable to circumvent the IWC whaling moratorium by playing one Convention off another’.¹³⁹⁵ It is strange, though, that - with the occasional exception - the linkage between the two treaties has gone largely unremarked upon by international commentators; and seems to have escaped serious analysis almost completely. It is, of course, not a particularly dramatic point - at least, not one that the media could realistically be expected to seize on.

In a different media report, it was reported from the COP that ‘[on] 12 November 2002 Delegates met in Plenary to hear the President of Chile and statements on cooperation with the [IWC]. Committee I continued deliberations on elephant proposals and other amendments to the Appendices’. In the Plenary session, the matter of CITES cooperation with the IWC was raised, with IWC Chair Bo Fernholm apparently ‘highlight[ing] his note on progress towards finalizing a revised management scheme (RMS) for commercial whaling (Inf.12)’. Norway and Japan, it seems, ‘did not endorse the note’ and both ‘questioned progress on the RMS’. In support, Iceland argued that CITES principles are breached by any state which opposes resumption under any circumstances of commercial whaling. Lending further support, Antigua and Barbuda stressed that ‘cooperation with the IWC should be based on sustainable international trade’; and, together with Dominica, ‘called for the IWC Chair to apologise for expressing his personal views rather than the views of IWC member states’. On the other hand, New Zealand, the UK, Australia, and the EU opposed the personal attacks on the IWC Chair’; and, with Germany, Mexico and the Netherlands, ‘highlighted progress’ apparently made within the IWC framework. Fernholm, who is the Swedish Commissioner to the IWC, apparently then said that ‘the debate reflects polarized views in the IWC’; but he ‘noted progress achieved at the RMS intersessional Cambridge meeting’.¹³⁹⁶

Along with the downlisting proposals it put forward to CITES COP 12 in 2002, Japan presented to the CITES Secretariat two draft resolutions dealing with the relationships between CITES and the IWC and between CITES and the United Nations Food and Agriculture Organisation (FAO). In the first resolution, it seems that Japan called for changes to be made to CITES Appendices (insofar as they apply to cetaceans) ‘only on the basis of scientific information and for controlled trade in whale products to be allowed between IWC member states’. In the second resolution, it seems that Japan called for ‘the views on CITES Appendix listing criteria [*sic*] of the FAO and regional fisheries management organisations to be given greater respect’.¹³⁹⁷ This certainly implies clearly that Japan is drawing links between

¹³⁹⁴ *Ibid.*

¹³⁹⁵ *Ibid.*

¹³⁹⁶ International Institute for Sustainable Development ‘CITES COP-12 Highlights’ *Earth Negotiations Bulletin* 13 November 2002 <http://www.iisd.ca/download/asc/enb2127e.txt> (accessed 29 July 2006).

¹³⁹⁷ ‘Japan to propose downlisting of minke, Bryde’s whales at CITES’ *JWA News* No. 2, August 2002 http://www.whaling.jp/english/news/0208_01.html.

the two treaties - the question to be asked is, of course, whether Japan is deliberately using one treaty to undermine the other?

Could CITES replace the IWC? This seems unlikely. Burns and Wandesforde-Smith comment that '[d]espite all the threats of recrimination and withdrawal that have swirled around the IWC in recent years, most of the parties, even including Japan in the aftermath of Shimonoseki, still seem to find it far more perilous to set out on their own than to continue to fight over their differences within the framework of the ICRW'. They conclude therefore that the ICRW 'is likely to remain the focal point for the management of commercial whaling in the future'.¹³⁹⁸

From CITES' side, too, there arguably is a concern about being undermined; or, at least, a desire to prevent CITES from being used to circumvent the IWC. At the end of COP 12 the states parties passed a Resolution on the relationship between CITES and the IWC. The Resolution recorded that:

... the Parties agree not to issue any import or export permit, or certificate for introduction from the sea, under this Convention for primarily commercial purposes for any specimen of a species or stock protected from commercial whaling by the International Convention for the Regulation of Whaling.¹³⁹⁹

In the Preamble to the Resolution, the states parties recorded that they:

CONSIDER that the International Whaling Commission has asked for the support of the Parties in protecting certain stocks and species of whales; ... ARE MINDFUL of the need for special attention to the conservation of whales and other cetaceans; ... RECALL also that the great whales have not generally recovered from the depletion brought about by commercial exploitation, even though many other species of exploited wildlife have recovered from equal or greater degrees of depletion; ... [and] AFFIRM [their] concern that any illegal trade in Appendix I whale specimens undermines the effectiveness of both the IWC and CITES.¹⁴⁰⁰

The language of this resolution - in particular, the words 'undermine[] the effectiveness of' - should be familiar language to us, recalling domestic legislation in the United States dealing with whaling, and almost certainly reflects the influence of the US.¹⁴⁰¹

6.1.11 Undermining or circumventing?¹⁴⁰²

'The whaling issue', it has been suggested by Stoett, 'strongly captures the inherent complexity of the political struggles to control or manage the global commons, especially the human competition and cooperation resulting from the controversy that so often ensues when territorial boundaries are unclear'.¹⁴⁰³ The African elephant, the present writer would like to suggest, epitomises similar complexity and the fates of the two species are increasingly bound together in international law and politics.

¹³⁹⁸ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 210.

¹³⁹⁹ Resol. Conf. 11.4 (Rev. CoP12) 'Conservation of cetaceans, trade in cetacean specimens and the relationship with the International Whaling Commission' http://www.cites.org/eng/resols/11/11_4.shtml.

¹⁴⁰⁰ *Ibid.*

¹⁴⁰¹ See 8.4.

¹⁴⁰² See (n 28).

¹⁴⁰³ P J Stoett *The International Politics of Whaling* (1997) at viii.

In October 2003 in Tokyo, SUPU-Japan, the Japanese chapter of the Sustainable Use Parliamentarians Union (SUPU), hosted delegates from twenty African countries. SUPU-Japan's chairman, Yutaka Takeyama, gave a speech in which he 'observed that excessive emphasis is now given only to protection of natural resources, under pressures from radical environmental organizations, at the sacrifice of effective utilization of the resources, as is observed at the meetings of the [IWC] and [CITES]'. In response, Ambassador Thiam Ousman Tolo of Guinea, on behalf of the African delegates, apparently said that 'developing countries use marine resources extensively, and protecting those resources without scientific evidence may threaten our wildlife resources'.¹⁴⁰⁴ This arguably shows linkage of the two species specifically, not just of the two treaties.

According to Komatsu, '[u]nder [the present] circumstances, we must achieve support from other organizations one by one until the IWC becomes isolated in the international community'. Toward this end, he explains, 'we need to take a multi-facet approach to the opening of the new sustainable whaling' and '[w]e chose CITES as our first approach to other international organizations'; currently, 'most of the large whale species managed by the IWC are listed in the Appendix I of CITES'. The purpose, he explains, 'of CITES listings of wild fauna and flora is to protect endangered species by way of control over international trade'; and then argues that 'it was absurd to list such healthy populations as minke whales, with 149 000 in the Atlantic and 760 000 in the Antarctic, in Appendix I as one of the most severely depleted species', and that such listing 'thus downgraded the credibility of CITES by this inaccurate listing'.¹⁴⁰⁵

This is crucial, and it arguably blows away the charges of naïvete levelled at the Japanese.¹⁴⁰⁶ In a sense, this is the 'smoking gun' for the present writer's efforts to link the species and treaties. Komatsu¹⁴⁰⁷ is actually suggesting using CITES to undercut the position of the anti-whaling majority at the ICRW/IWC. Further, he is recording that this was a policy of Japan's.

6.1.12 CITES COP 13, 2004 and downlisting of whales

After the 13th CITES COP it was reported, or at least argued, in *JWA News* that '[i]nternational understanding on sustainable use of whales' had been 'visibly advanced at [COP 13] as Japan's two whale-related proposals garnered the largest ever number of support votes'. It seems that Japan first put forward a proposal that CITES 'urge the IWC for an expedited completion of the RMS'; with Japan's proposal being 'aimed at enabling CITES to make decisions on trade regulation of whales in accordance with its Appendixes expeditiously'. After argument, the proposal was voted on and failed; but fairly narrowly, with 57 votes in favour, 63 against and 13 abstentions.¹⁴⁰⁸ After this, Japan put forward a proposal to downlist minke whales from Appendix I to II; specifically, downlisting of the Northern Hemisphere

¹⁴⁰⁴ 'SUPU-Japan Invites African States to Join the Union for Sustainable Use' *JWA News* No.8, December 2003 http://www.whaling.jp/english/news/0312_01.html.

¹⁴⁰⁵ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 151-2.

¹⁴⁰⁶ Unless one argues for the word in a different sense, and contends that by making the links so specific the Japanese are being clumsy negotiators.

¹⁴⁰⁷ Japanese Counsellor for International Negotiations, representing Japan for whaling, tuna fisheries, trawling, as well as at FAO and CITES. Has been an alternate Commissioner for Japan to the IWC. In March 2001, Chaired the Committee on Fisheries of FAO.

¹⁴⁰⁸ 'Support Votes Increase for Proposed Alleviation on Minke Whale Trade at CITES COP 13' *JWA News* No 11, January 2005 http://www.whaling.jp/english/news/jwa_news_11.pdf (accessed 7 June 2006).

minke whale, based on the fact that ‘the present abundant state of Northern Hemisphere minke whales does not comply with’ the requirements of Appendix I. Voted on, the proposal failed with 55 in support, 67 against and 14 abstentions.¹⁴⁰⁹ In the judgment of *JWA News*, these votes showed that ‘international understanding on sustainable use of whales has further expanded because both proposals, although defeated, gained the largest number of support’. The journal ascribed this, at least partly, to the use of the secret ballot which was adopted, at Japan’s request, ‘with a view to exclude unjustified pressures on developing countries from some conservationist-oriented Western nations and animal welfare groups’.¹⁴¹⁰

Strangely, however, *JWA News* argued also that at the same COP, ‘on other fronts’, Japanese fisheries sources had ‘expressed a concern about an apparent trend in CITES toward its greater involvement in the management of marine species, which, they see, would call for adequate caution from the viewpoint of sustainable users’.¹⁴¹¹ This implies that Japan is probably not in favour of the wholesale linking of treaties; but that it wishes to see this happen selectively. The further implication is that the downlisting proposals are indeed being used to put pressure on the IWC; rather than that they are intended to presage a new era of full linkage, or even to bring the treaties particularly closer together.

In the anti-whaling media, it was reported during and after the COP that ‘[o]nce again, as it happens every year since 1987 in every CITES COP, Japan introduces a proposal to transfer the [] Minke whale from Appendix I to Appendix II’; and ‘once again, as it happens since 1987, Parties said no’. According to this report, Committee I analysed the Japanese proposal ‘for transferring the Okhotsk Sea-West Pacific Stock, Northeast Atlantic Stock and the North Atlantic Central Stock of Common Minke whale’; but, put to a vote (which was a secret ballot, at Japan’s request) the proposal failed with 55 votes in favour, 67 against and 14 abstentions.¹⁴¹² It was then argued in the same report that at COP 12 Japan had introduced a similar proposal which had also been rejected by Committee I; but that Japan had then reopened debate in Plenary session with an amendment of its original proposal. Although at COP 12, Plenary had rejected such amended proposals; the argument was made that Japan would again try to re-open debate on this issue during Plenary sessions.¹⁴¹³

It was further recorded that another familiar Japanese proposal had not been accepted; this being a proposal ‘for a Resolution for CITES to urge the IWC to complete and implement its Revised Management Scheme (RMS) for commercial whaling’. Apparently, countries which argued against the proposal included Brazil, the EU, New Zealand and the US; whilst those which argued in its favour included Iceland, Namibia, St Kitts and Nevis and Gabon. At the request of Japan, there was once again a secret ballot; but the proposal failed with 57 votes in favour, 63 against, and 13 abstentions.¹⁴¹⁴

It was further reported that on the last day of COP 13 Japan did indeed try to re-open debate regarding its proposal ‘to transfer the Okhotsk Sea-West Pacific Stock, Northeast Atlantic

¹⁴⁰⁹ *Ibid.*

¹⁴¹⁰ *Ibid.*

¹⁴¹¹ *Ibid.*

¹⁴¹² ‘Japan wasn’t able to downlist minke whales’ Fundación Cethus http://www.cethus.org/Cites_13avaEN.htm (accessed 29 July 2006).

¹⁴¹³ *Ibid.*

¹⁴¹⁴ *Ibid.*

Stock and the North Atlantic Central Stock of Common Minke whale’. However, Japan failed to obtain enough support from Parties to reintroduce the issue in Plenary session and so Committee I’s decision remained; and the Plenary ratified also Committee I’s decision to reject the Japanese, proposal that CITES ‘push IWC to complete and implement its [RMS] for commercial whaling’.¹⁴¹⁵

6.2 A change of approach

6.2.1 CITES COP 14, 2007, and the downlisting of whales

In the lead-up to the 14th COP, Japan submitted a Working Document on ‘interpretation and implementation of the Convention’; in which it argued that the ‘scientific veracity’ of the listing (between 1975 and 1986) on Appendix I of all species of whales managed by the [IWC] has ‘not been tested against the most recently adopted criteria for listing species in Appendix I (Res. Conf. 9.24 (Rev.COP13))’.¹⁴¹⁶ The Document then recalled that in July 2000 the Secretary General of CITES had written to the IWC and ‘express[ed] serious concern’ about the ‘escalating and increasingly divisive conflict’ within the IWC; before expressing the view that it was ‘therefore crucial’ that the IWC ‘soon make important progress toward the adoption of a Revised Management Scheme’ which would enable the CITES COP to ‘adopt the appropriate management regime’ for listed species of whales. The Document then recalled that fourteen separate proposals to downlist species of whales had been put forward at the last four CITES COPs; all of which were ‘denied’ by the COP. Japan’s Document then pointed out that parties opposing the transfer proposals have ‘maintained that CITES should not transfer these species before’ the IWC’s RMS and RMP were completed; but then pointed out that at IWC 58 in 2006, the IWC ‘agreed to postpone any further discussion towards completion of a[n] RMS’. Japan’s Document then argued that ‘[a]ppropriate listing of cetacean species on the Appendices of CITES would ensure proper international regulation of the trade’; and suggested that CITES’ 2005 Strategic Vision, Goal 2, included two objectives relevant here, viz. that it should be ensured that CITES’ Appendices ‘correctly reflect the conservation and management needs of species’ and, secondly, that it should be ensured that ‘decisions to amend CITES’ Appendices are founded on sound and relevant scientific information and meet the agreed biological and trade criteria for such amendments’.¹⁴¹⁷

The Working Document then proposed two Draft Decisions. The first, directed to the Animals Committee of CITES, proposed that that Committee:

... shall include in its Review of the Appendices all cetaceans in Appendix I that are managed by the IWC. In addition to evaluating the listing of these species against the criteria for inclusion of species in Appendix I contained in Res. Conf. 9.24 (Rev. COP13), the Animals Committee shall, for consideration at COP 15, propose amendments to update Res. Conf. 11.4 (Rev. COP12) based on: i) a review of the current situation regarding illegal trade in whale products, ii) advice from the IWC Scientific Committee concerning the status of whale stocks and, iii) the decision of the IWC that the moratorium on commercial whaling is no longer required.¹⁴¹⁸

¹⁴¹⁵ *Ibid.*

¹⁴¹⁶ CITES ‘Cetaceans: submitted by Japan’ COP 14 2007 WORKING DOCUMENTS SUBMITTED BY PARTIES http://www.cites.org/common/cop/14/raw_docs/E-JAO1-cetaceans.pdf (accessed 24 February 2007).

¹⁴¹⁷ *Ibid.*

¹⁴¹⁸ *Ibid.*

The second Draft Decision was in the form of a Direction to the CITES Secretariat that it write to the IWC Secretariat:

... conveying the concern of the [COP] regarding the postponement of the RMS discussions and, in the spirit of Article XV, paragraph 2.(b), to ensure co-ordination with conservation measures, request scientific data and seek advice concerning the listing of whale species on CITES [A]ppendices in the absence of any prospect for the completion of the RMS.¹⁴¹⁹

6.2.2 *Whales at COP 14*

Right at the start, in a discussion of the Report by the Animals Committee, Argentina, supported by Germany on behalf of the European Union, argued that no review of whale stocks ought to take place under CITES, as the IWC was examining whale stocks. The matter was referred for Committee discussion.¹⁴²⁰

In Committee 1, it was decided by vote - by 54 votes against 26 - that great whales will not be subjected to a periodic review for so long as the moratorium in the IWC remains in place.¹⁴²¹ In proposing the periodic review, Japan argues that it would ensure that CITES 'operates on the basis of current scientific information'; and that the proposed review would have no effect on the IWC moratorium. In support, both Norway and St Kitts and Nevis warned that decisions within CITES ought not to be based on any criteria but scientific ones; and China stated that it would welcome any additional information which would result from the proposed review. In opposition, Australia argued that the IWC is the 'agreed competent authority'; Argentina argued that the proposed review would duplicate the processes of the IWC's Scientific Commission; and the European Union reminded parties that the IWC had recently passed a resolution on interaction between CITES and the IWC in which it is stated that the moratorium on commercial whaling is still in place. Brazil stated that it encouraged non-lethal use of whales.¹⁴²² Another vote was taken on a proposal by Australia, that no periodic review of any of the great whales should occur whilst the IWC's moratorium remains in place, and was passed by 59 votes to 21. This proposal had been in response to a proposal from the Animals Committee to include in the periodic review the central stock of the North Atlantic fin whale.¹⁴²³

Ultimately, it appears that what happened was that Japan proposed, in Committee I, a periodic review of all listed cetaceans, in order to 'ensure that the Convention operates on the basis of current scientific information'; and argued that this 'would not affect' the IWC moratorium on commercial whaling. China 'welcomed the additional information that would result from the review'; and, in support of the proposal, Norway and St Kitts and Nevis 'cautioned against basing CITES decisions on criteria other than science'.¹⁴²⁴ In opposition, Australia pointed out that the IWC is the agreed competent authority; Argentina, speaking on behalf of several central and southern American countries, said that a review would duplicate the work of the IWC's Scientific Committee; and the EU 'reminded' parties of the IWC's recent resolution on

¹⁴¹⁹ *Ibid.*

¹⁴²⁰ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES: Highlights' *Earth Negotiations Bulletin* Vol. 21 No. 52, 5 June 2007.

¹⁴²¹ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES: Highlights' *Earth Negotiations Bulletin* Vol. 21 No. 54, 7 June 2007.

¹⁴²² *Ibid.*

¹⁴²³ *Ibid.*

¹⁴²⁴ International Institute for Sustainable Development (IISD) 'Summary of the Fourteenth COP to CITES: 3-15 June 2007' *Earth Negotiations Bulletin* Vol. 21 No. 61, 18 June 2007.

interaction between CITES and the IWC, which states that the commercial whaling moratorium is in place.¹⁴²⁵ The proposal was then rejected, in Committee I, by 54 votes to 26; and the decision was confirmed in plenary on the 14th of June.¹⁴²⁶

Also in Committee I, the Animals Committee (AC) proposed that the central stock of North Atlantic fin whales be included in the periodic review. However, this was opposed by Argentina, Australia, Brazil, and the US; with Australia introducing a draft decision instructing the AC that no periodic review of any great whale should occur while the IWC moratorium is in place. This latter proposal was approved by 59 votes to 21.¹⁴²⁷ On 13 June, Palau apparently did hint in plenary at a possibility that it might seek to revisit the periodic review of whales.¹⁴²⁸ However, this would probably have meant the reopening of many other marine proposals, and nothing came of the effort. What seems to have happened, in fact, was that Palau failed by one vote on 15 June to reopen debate (35 for and 71 against, with one-third support being needed). Plenary therefore adopted Committee I's decision; and the COP instructed the AC that 'no periodic review of any great whale, including the fin whale, should occur while the IWC moratorium is in place'.¹⁴²⁹

6.2.3 *The 'primacy' of the IWC over CITES*

Sand argues that there may be an impression that, because CITES has listed all of the great whales (with the exception of certain sub-species) on its Appendix I, the IWC takes priority over CITES in respect of whales, but that - in his view - this perception of primacy is not correct.¹⁴³⁰ He argues that the requirement - in Article 15(2)(b) - that CITES 'consult' with the IWC before amending its Appendices, the IWC being one of the 'inter-governmental bodies having a function in relation to [marine] species', serves merely to illustrate that the two autonomous global regimes supplement and complement each other.¹⁴³¹ He then describes this as being 'a variety of interplay not untypical in modern international law'.¹⁴³²

6.2.4 *Reservations in place*

As at 13 September 2007, Japan had reservations lodged in respect of the common (Northern) minke whale (except for the Appendix II-listed population of West Greenland), the Antarctic minke whale, the sei whale (although not to populations in the North Pacific and between the equator and the Antarctic), the Bryde's whale, the fin whale, the sperm whale, the Irrawaddy dolphin, and the Baird's beaked whale, which are all listed on Appendix I.¹⁴³³ Iceland has reservations over the common (Northern) minke whale (except for the Appendix II-listed population of West Greenland), the Antarctic minke whale, the sei whale (unrestricted), the

¹⁴²⁵ *Ibid.*

¹⁴²⁶ *Ibid.*

¹⁴²⁷ *Ibid.*

¹⁴²⁸ International Institute for Sustainable Development (IISD) 'Fourteenth COP to CITES: Highlights' *Earth Negotiations Bulletin* Vol. 21 No. 60, 15 June 2007.

¹⁴²⁹ International Institute for Sustainable Development (IISD) 'Summary of the Fourteenth COP to CITES: 3-15 June 2007' *Earth Negotiations Bulletin* Vol. 21 No. 61, 18 June 2007.

¹⁴³⁰ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 60-61.

¹⁴³¹ *Ibid.* at 61.

¹⁴³² *Ibid.*

¹⁴³³ 'Reservations entered by Parties: in effect from 13 September 2007' available at *Reservations* at http://www.cites.org/eng/app/reserve_index.shtml (accessed 23 May 2008).

blue whale, the fin whale, the humpback whale, the sperm whale, and the northern bottlenose whale. Iceland also has reservations lodged over various Appendix II cetaceans, these being the West Greenland population of the humpback whale, seven species of dolphin, the killer whale, and one species of porpoise.¹⁴³⁴ Norway has reservations lodged over the common (Northern) minke whale (except for the Appendix II-listed population of West Greenland), the Antarctic minke whale, the sei whale (although not to populations in the North Pacific and between the equator and the Antarctic), the fin whale (although only in respect of populations in the North Atlantic off Iceland and Newfoundland, and in a southerly region near Antarctica), and the sperm whale.¹⁴³⁵

Palau has reservations lodged in respect of the common (Northern) minke whale (except for the Appendix II-listed population of West Greenland), and the sperm whale.¹⁴³⁶ St Vincent and the Grenadines has a reservation lodged over the humpback whale.¹⁴³⁷

6.2.5 Conclusion

In a sense, this Chapter was arguably the crux of the present thesis; with the case being made that certain pro-whaling states have deliberately tried to shift the debate from the ICRW - which they may have seen as being deadlocked, and possibly beyond salvation - to CITES.

At the same time, it is important to understand the extent to which the debate over how best to utilise wildlife generally has shifted - with terminology changing and new understandings of the complexity of ecosystems being argued for. This has made the debate far more complicated than a mere choice between 'using' and 'not using'. The argument that there are 'too many whales', and that humans need to use them, has come to mirror the argument that there are 'too many elephants' and that elephants must 'contribute to their own survival'.

While in one sense the argument (in its narrowest sense) which this thesis set out to make has now been completed, at this point it is important to turn to an examination of various related aspects - which all throw light on different angles of the issue; and without an understanding of which a full understanding of the argument is not possible. These aspects need to be considered before this thesis concludes. What needs also to be considered is the global importance of the political and legal linkages established between the two treaties and the two species.

¹⁴³⁴ *Ibid.*

¹⁴³⁵ *Ibid.*

¹⁴³⁶ *Ibid.*

¹⁴³⁷ *Ibid.*

7 The elephant, the whale and divergent approaches to conservation

7.1 Consumptive and non-consumptive

7.1.1 *Different approaches*

The elephant issue highlights two different approaches that can be taken to conservation. The 'Kenyan model' attempts to maintain elephant populations by ensuring absolute protection from poachers and by banning all trade in elephant products. The approach of the Southern African countries is to manage elephant populations actively, culling animals to provide sufficient habitat, sharing profits with local people (ideally, that is) and ploughing profits back into conservation (ideally, that is).

Put as forcefully as it is possible to put it by Parker, there is a huge gulf between different camps' understanding of and appreciation for elephants. In Parker's words, '[e]lephants as sources of pure joy to Africa's visiting tourist are worse than smallpox to the peasant whose crops they have just destroyed'.¹⁴³⁸

7.1.2 *Elephants and whales as symbols*

Leakey, however, suggests that '[c]lean air, clean water, plentiful forests, and a human population that is well fed, educated, and reasonably affluent is our goal in Kenya. Saving the elephants is symbolic - a means to achieve these greater objectives'.¹⁴³⁹ This is a different angle to the elephant as a symbol - not just a symbol for preserving wildlife, but a symbol for improving human life ... for sustainable development itself.

Kreuter and Simmons, quoting Western, write that 'the African elephant is an important conservation *symbol*', and that it has been claimed to be an important 'conservation flagship' because 'it evokes strong sympathy and can, given public support, protect the integrity and diversity of African ecosystems'.¹⁴⁴⁰ The same writers, quoting Peterson, note that the 'current controversy over elephant conservation [is] a controversy that is less a rational discourse than a conflict between widely differing socio-economic and symbol systems. It has evolved due to two diametrically opposed perceptions of the relationship between mankind and nature. These perceptions are embodied in the preservationist philosophy, where mankind is excluded from nature, and the utilitarian philosophy, in which mankind has dominion over nature'.¹⁴⁴¹ This is the basic debate.

Kreuter and Simmons write that, '[d]ependent on public donations, Western conservation groups rallied to the call for a ban. By merging the diverse characteristics of the well known African elephant, they created a mediagenic conservation totem through which *Elephant extermination imminent* is reported to have become the most lucrative slogan in the environmental movement's history. Yet, while capitalizing on public sentimentality over

¹⁴³⁸ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 381.

¹⁴³⁹ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at xi.

¹⁴⁴⁰ U P Kreuter & R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 39.

¹⁴⁴¹ *Ibid* at 40.

elephants, Western conservation groups and governments have provided few resources to improve elephant protection'.¹⁴⁴² An important link between species is that exactly the same point has been made about the whale - the 'super whale,' per Kalland.¹⁴⁴³

The whale exemplifies the same divergence of opinion as does the elephant. 'To the whaling nations', writes Bowman, 'the relatively plentiful stocks of certain cetacean species has meant that there could be no legitimate justification for refusing to sanction the resumption of commercial whaling'; for others the 'real need' is to prevent both the extinction of cetacean species and the death and suffering of 'individual sentient and highly intelligent creatures'.¹⁴⁴⁴

Friedheim writes that '[n]ot all of those opposed to whaling are amenable to a reasoned interaction on the issues; those whose position is primarily normative are likely to remain obdurate'. If, he continues, 'it is a matter of secular faith that whales are special sentient beings who should never be killed, then no arguments concerning sustainability or any other utilitarian concept will be persuasive'.¹⁴⁴⁵ On the other side, perhaps, David Attenborough argues that it is not possible to kill a whale at sea in a humane manner, and questions whether whaling should 'still be tolerated by a civilised society'.¹⁴⁴⁶

According to Stone, in the '*American Cetacean Society* litigation', the Society, in an effort to prevent Japanese whaling, sued to compel the US to invoke trade sanctions against Japan for allegedly 'undermining the effectiveness' of the ICRW.¹⁴⁴⁷ Stone continues; arguing that the decision in the *American Cetacean Society*¹⁴⁴⁸ case was 'liberal' in that it 'recognized the right of a group to go to court and at least stir up some conversation about whether Japan was undermining the International Whaling Convention'. But, he says, 'to force a decision whether Japan is abiding the Convention - the human community of nation's agreement among themselves as to the rate and conditions under which the whales can be killed - is not the same as empowering someone to speak *for the whales*'.¹⁴⁴⁹

In a more recent American case, the *Cetacean Community* case,¹⁴⁵⁰ of October 2004, the relevant Circuit Court decided that 'the world's cetaceans' did not have 'standing to bring suit in their own name under the Endangered Species Act, the Marine Mammals Protection Act, the National Environment Protection Act, and the Administrative procedure Act'.¹⁴⁵¹ The Cetacean Community (meaning 'all of the world's whales, porpoises, and dolphins' had

¹⁴⁴² *Ibid* at 49.

¹⁴⁴³ See Kalland at (n 2350) and (n 2353).

¹⁴⁴⁴ M Bowman 'The Nature, Development and Philosophical Foundations of the Biodiversity Concept in International Law' in C Redgwell & M Bowman (eds) *International Law and the Conservation of Biological Diversity* (1995) 5 at 5.

¹⁴⁴⁵ R L Friedheim 'Negotiating in the IWC Environment' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 219.

¹⁴⁴⁶ 'David Attenborough joins campaign against cruelty of whaling' 9 March 2004

<http://www.guardian.co.uk/conservation/story/0,13369,1165206,00.html>.

¹⁴⁴⁷ C D Stone 'Epilogue: "Trees" at Twenty Five' in *Should Trees Have Standing? and other essays on law, morals and the environment* (1996) 159 at 166-7.

¹⁴⁴⁸ US Supreme Court *Japan Whaling Association v American Cetacean Society* 478 U.S. 221 (1986). (Decided 30 June 1986.) See <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=478&invol=221>.

¹⁴⁴⁹ C D Stone 'Epilogue: "Trees" at Twenty Five' in *Should Trees Have Standing? and other essays on law, morals and the environment* (1996) 159 at 175.

¹⁴⁵⁰ *The Cetacean Community v George W Bush, President of the United States of America; Donald H Rumsfeld, United States of America Secretary of Defense* US Court of Appeals for the 9th Circuit, No. 03-15866, D.C. No. CV-02-00599-DAE/BMK, filed 20 October 2004.

¹⁴⁵¹ *Ibid* at 14782-14783.

challenged the US Navy's use of certain sonar equipment; which equipment, the Cetaceans contended (through their 'self-appointed attorney'¹⁴⁵²), harms them by causing tissue damage and disruption of important biological behaviour such as feeding and mating.¹⁴⁵³ In an even more recent case, an appeal from a Californian District Court (judgment confirmed by a federal appeals court), the US Supreme Court decided in November 2008 (voting 6:3) to lift restrictions on the US Navy's conducting sonar experiments off California without first having conducted an environmental impact assessment. The Supreme Court found that the concerns of the environmental groups which had brought the original action were outweighed by the interests of national security.¹⁴⁵⁴

To other commentators, like McGuinness writing in May 2002, '[i]f the survival of a whale species is not threatened ... [w]here does the obsession with preventing whaling spring from?'.¹⁴⁵⁵ Once the 'rational aim of ensuring the survival of species has been achieved', he says, the rest becomes merely 'a hotchpotch of emotion and superstition. Of course whales are remarkable beasts, but so are pigs - and no less intelligent. What makes whales morally superior to pigs?'.¹⁴⁵⁶ His answer, in the Australian context, is that it is bureaucrats who are pushing for the preservation of whales - in response to middle class concerns.¹⁴⁵⁷ While the writer's language here is as emotive as is that of the 'whale preservationists', an important point is raised in the suggestion that the distinction between whales and pigs, or any other animals, may indeed be an arbitrary one.

7.1.3 *Changing views*

It might well be that more and more peoples', and nations', views, globally, *are* changing. Komatsu and Misaki record that in 1992 only five nations, Japan, Norway, Iceland, St Vincent and the Grenadines, and St Lucia, formed the 'pro-whaling bloc'; but 'now we look around and find more countries are on our side. At times there are as many as 14 nations supporting our cause for the sustainable use of whales'. On the other hand, they say, the anti-whaling bloc 'led by Australia and New Zealand consists of around 16 nations'. They concede that '[a]s legally binding decisions require a three-quarter majority of votes at the IWC, and with the disparity of two polarized blocs, the situation at the IWC seems all in impasse'; but then argue that Japan feels 'more comfortable now than we did in the earlier days'; and that this 'is because we know that our cause for the sustainable use of marine resources is gaining wider recognition'.¹⁴⁵⁸

There were only 30 members at their time of writing in 2001 - which means that IWC membership more than doubled since then, in only some five years; and by June 2007 there were 76 members, and 83 by December 2008.

¹⁴⁵² Named Lanny Sinkin. *Ibid* at 14782.

¹⁴⁵³ *Ibid* at 14783.

¹⁴⁵⁴ J R Pegg 'Navy Wins, Whales Lose US Supreme Court Sonar Case' *Environment News Service* 12 November 2008 <http://www.ens-newswire.com/ens/nov2008/2008-11-12-10.asp> (accessed 13 December 2008).

¹⁴⁵⁵ P P McGuinness 'Whale-Huggers' Case is Up the Spout' *Sydney Morning Herald* 28 May 2002 in *ISANA* No.26, December 2002 www.whaling.jp/english/isana/no26_03.html.

¹⁴⁵⁶ *Ibid*.

¹⁴⁵⁷ *Ibid*.

¹⁴⁵⁸ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 160-1. See 16.

Komatsu and Misaki write, further, that '[e]ven if we accept that to certain people whales are their favourite icons of environment, it is inexcusable that such a favouritism is used as the moral standard. And of course such moral based arguing is not the task for the IWC mandated by the ICRW'. There has not, they point out strongly, 'been one instance in which anti-whaling forces conceded to any of the Japanese requests for sustainable use of whale resources'; and that 'in some cases, the anti-whaling side gained a concession from Japan by giving promises that have never been fulfilled'.¹⁴⁵⁹ This certainly was the experience of the present writer attending IWC 59 in 2007; where the anti-whaling countries were willing to make no concession whatsoever to Japan, and Japan left the meeting on an angry note and with accusations of broken promises.¹⁴⁶⁰ A sense of outrage and betrayal is not unique to the anti-whaling nations.

Australia, according to D'Amato and Chopra, is a nation which engaged heavily in whaling; but which declared in 1979 that 'the harpooning of these animals is offensive to many people who regard killing these special and intelligent animals as inconsistent with the ideals of mankind, and without any valid economic purpose in mitigation'.¹⁴⁶¹

The debate can be put in fairly simple terms. Chadwick suggests that '[a] philosophical Great Rift has always split the conservation community, and I cannot think of how to define it other than in somewhat simplistic fashion. On the one side are people drawn to animals because they intrinsically care for them';¹⁴⁶² and 'on the other side are people who envision wildlife as a resource that we have a right to direct as we see fit. Their concern is an extension of the human drive to improve and master'.¹⁴⁶³ 'To risk simplifying things even further', he writes, 'the one side believes that people should stop doing so many things to wildlife, whereas the other believes the answer to saving wildlife is to do more things to it. Hands off versus hands on'.¹⁴⁶⁴

It might even be that the very protections of certain species in international law represent the 'speciesist' whims of majority voting parties. In 1983 when the minke whale was added to Appendix I of CITES, for example, it was noted against the proposal that there was no scientific evidence that any putative populations of the species were endangered in terms of CITES' criteria for listing.¹⁴⁶⁵ This, it can be argued, means that the listing was an early example of the precautionary principle being applied in regard to cetacean conservation - and the poor present population recovery rates do support the value of the approach. It could also, however, be argued that it was purely an illogical and inconsistent application of arbitrary criteria.

¹⁴⁵⁹ *Ibid* at 162-3.

¹⁴⁶⁰ See 3.3.32.

¹⁴⁶¹ A D'Amato & S K Chopra 'Whales: Their Emerging Right to Life' (1991) 85 *The American Journal of International Law* 21 at 22. What is being referred to is the Australian decision to cease whaling; after publication of the *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volumes I and II* (1978). News reports in January 2004 claim that some Australian fishermen killed and ate (parts of) a whale (the species of which was unidentified) in the international waters of the Tasman Sea, 270nm west of New Zealand's EEZ. This provoked media outrage. G Ansley 'Australian fishing crew accused of killing whale near NZ waters' *The New Zealand Herald* 21 January 2004 <http://www.nzherald.co.nz/storydisplay.cfm?storyID=3544700&thesection=news&thesubsection=world>.

¹⁴⁶² D H Chadwick *The Fate of the Elephant* (1992) at 104. See (n 1071).

¹⁴⁶³ *Ibid* at 104.

¹⁴⁶⁴ *Ibid* at 104-105.

¹⁴⁶⁵ A Gillespie 'Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans' Draft article for publication in (2002) 33 *Ocean Development & International Law* 17 at 33-4.

According to Tsutomu Takebe, Japanese Minister of Agriculture, Forestry and Fisheries, '[w]hen we discuss whales and whaling, we tend to view the matter in a dualistic manner, disputing whether they should be protected or used'; whereas 'what we should really consider is how to make sustainable use of robust and healthy whale stocks without adversely affecting them, while protecting the depleted and endangered ones. In fact, this is Japan's fundamental policy on whaling and whale resources'.¹⁴⁶⁶ It would seem that this is Japan's policy on other uses of natural resources also.

Essentially, there are two ways to view the sustainable use of natural resources - consumptive and non-consumptive. The split in the usage of both elephants and whales mirrors this - there are those States which argue for non-consumptive use, and those which argue that the money which can be made from consumptive use can be ploughed back into conservation and, in this way, wildlife pays for its own protection.

While the battles over how best to use and manage elephants and whales continue to rage, and as opposed views seem ever less compatible, the two species have gradually been turned into icons of the cause - with the exponents of each view pushing their 'poster child' forward as a symbol.

¹⁴⁶⁶ 'Pro-whaling voices gain firmer ground at the 54th IWC Meeting in Simonoseki' *JWA News* No. 1, July 2002
http://www.whaling.jp/english/news/0207_01.html.

8 Important aspects of the administration of whaling

8.1 The Revised Management Procedure (the RMP, including the RMS)

8.1.1 *The role of science*

Aron states that ‘since its inception in 1946 the commission has proved anything but conservative [the word used in the sense here of being in favour of ‘sustainable use’], and the role of science in its decision making has been generally ineffective’.¹⁴⁶⁷ One irony of this is that, where the pro-whaling States today complain that science is being ignored, historically it was ignored - by the pro-whaling states! It is ironic that both sides have ignored science when it suited them; just as both sides have packed the Commission’s ranks of voters with their own supporters.

This is not what was expected by those States who were party to the ICRW at the time of the moratorium vote. Gambell writes that along with the imposition of a moratorium on commercial whaling, the IWC agreed ‘that the provision would be kept under review and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits’.¹⁴⁶⁸ Part, Gambell explains, of the comprehensive assessment program was to be the development of a Revised Management Procedure (RMP) for setting catch quotas in preparation for the moratorium being lifted, should this be agreed to. Although Gambell does not actually say so at this point, it stands to reason that the preparation of an RMP was to be a requisite for the moratorium being lifted - the two therefore being inseparable. At the 1991 Meeting, the Scientific Committee then identified one of five procedures which had been put forward as being suitable to replace the discredited NMP; and recommended the adoption of this one. The IWC then adopted this RMP formally, with some modifications, at its 1994 Meeting.¹⁴⁶⁹

Certainly, the tenor of proposals, and the debates around them, made to the IWC in the late 1970s and early 1980s, when new or reformist members Parties were pressing hard for moratoria on various issues, was that these were indeed to be moratoria - and not to be permanent bans. As an example of this tenor, consider the Opening Statement by the United Kingdom at IWC 33 in 1981, where the UK Commissioner said that ‘I emphasis that what we are proposing is a moratorium. We recognise that other countries have a legitimate commercial interest in whaling and if, in the future, it could be shown beyond reasonable doubt that some exploitation of stocks might safely be resumed, and that satisfactory methods of killing were available, the lifting of the ban might be considered’.¹⁴⁷⁰

¹⁴⁶⁷ W Aron ‘Science and the IWC’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 105 at 105.

¹⁴⁶⁸ R Gambell ‘I Am Here, Where Should I Be?’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 70. Gambell advises that, ‘[w]hile the intent of the Commission in developing this provision was unclear, and its interpretation ambiguous, following this decision, the Scientific Committee of the IWC embarked on the process that came to be known as the Comprehensive Assessment of whale stocks’. *Ibid* at 70.

¹⁴⁶⁹ *Ibid* at 72-73. Gambell explains that ‘[t]he objective of the RMP is to provide an acceptable balance between conservation and exploitation of baleen whales and to provide a simple and convenient method for determining catch limits with minimal requirements for data. It seeks to ensure that depleted stocks are replenished, and that no whaling is permitted on stocks that are below 54 percent of their initial population levels. The goal is to obtain the highest possible continuing yield, with stable catch limits, ultimately bringing all stocks to the 72 percent of their initial levels’. *Ibid* at 72-73.

¹⁴⁷⁰ UK Commissioner, IWC ‘Opening Statements at the Thirty-Third Annual Meeting’ (20-25 July 1981, Brighton) IWC/33/OS/UK at 1.

8.1.2 The adoption of the RMP

Rose and Paleokrassis record that '[a]t the IWC's 44th Meeting in 1992, a catch limit algorithm (CLA) was adopted as a central feature of the proposed revised whale management scheme'. They explain this as being 'a mathematical formula designed to account for all variables, including lack of reliable information, concerning whale population sizes and for setting catch limits which would ensure that populations are not depleted'. If, they comment, it proves to be 'as well designed as anticipated, it will contain safeguards against poor information and, thus, represent a partial implementation of the Precautionary Principle in whale management'.¹⁴⁷¹

On the adoption of the RMP, Komatsu and Misaki write that '[t]he [earlier] NMP was a management tool using Maximum Sustainable Yield theory on a stock-by-stock basis';¹⁴⁷² and that in order to replace this tool the 'Scientific Committee took about seven years of rigorous simulation trials to develop the procedure that can withstand all manners of scenarios'.¹⁴⁷³ The same authors suggest that when the RMP 'passed the final trial and was adopted by the Scientific Committee', this meant the introduction of the 'most strict management procedure with the highest protection given to whale stocks. Any stocks that are assessed to be under the protection level remain outside the application of the RMP'.¹⁴⁷⁴

Resolution 1994-5, 'Resolution on the Revised Management Scheme', was adopted in 1994 at IWC 46.¹⁴⁷⁵ In other words, the RMP *has* in fact been adopted, the IWC could be allowing

¹⁴⁷¹ G Rose & G Paleokrassis 'Compliance with International Environmental Obligations: A case study of the International Whaling Commission' in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 159. See 11.4.

¹⁴⁷² 'Under the procedure, whale stocks were classified into three categories, Initial Management Stock, Sustainable Management Stock and Protection Stock. A stock with a population level unsustainable for whaling would be placed in the Protection stock category, awarding it a zero catch'. M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 86.

¹⁴⁷³ *Ibid* at 86.

¹⁴⁷⁴ *Ibid* at 135-136.

¹⁴⁷⁵ Resolution 1994-5, 'Resolution on the Revised Management Scheme', reads as follows:

WHEREAS the [ICRW] recognises the interests of the nations of the world in safeguarding for future generations the great natural resources of the whale stocks; ... Now, THEREFORE, the Commission: (1) EXPRESSES its appreciation for the work of the Scientific Committee in completing the Revised Management Procedure, its specification and documentation, and consideration of associated scientific issues; (2) WELCOMES the full documentation of the program which implements the *Catch Limit Algorithm* underlying the Revised Management Procedure; (3) ACCEPTS that the specification of the Revised Management Procedure ... completes the main scientific component in the development of a Revised Management Scheme for commercial baleen whaling; (4) NOTES that this specification should not be modified, reconfigured or adjusted unless expressly instructed by the Commission; ... (7) NOTES the Scientific Committee's agreement that all points raised by Committee meeting documents which dealt with concerns arising from the NMFS review of the Revised Management Procedure had been adequately addressed; (8) ASKS that the Secretary, with the assistance of the Scientific Committee, thoroughly investigate past catch data and that the Scientific Committee evaluate implications of these findings during the implementation simulation trials for each relevant species/area; (9) NOTES that the additional steps required to complete the Revised Management Scheme include agreement on: (i) an effective inspection and observation scheme which fully addresses *inter alia* the issues of under-reporting and mis-reporting of catches; (ii) further elaboration of the 'Guidelines for conducting vessel surveys and analysing data within the Revised Management Scheme' ... to ensure adequate levels of international collaboration in the survey design, conduct and analysis; (iii) arrangements to ensure that the total catches over time are within the limits set under the Revised Management Scheme; (iv) incorporation into the Schedule of the specification of the Revised Management Procedure and the other elements of the Revised Management Scheme; (10) While NOTING the advice of the Scientific Committee that there would be little advantage in modifying the *Catch Limit Algorithm* further to account for environmental change, CONSIDERS that results emanating from the Scientific Committee's planned workshops on chemical pollution and climate change may nevertheless have an impact on other elements of the RMS and the Comprehensive Assessment; (11) AGREES that the Revised Management Scheme shall be structured so that: (i) commercial whaling shall only be permitted for populations in areas and seasons for which catch limits are in force; (ii) these catch limits shall have been calculated by the Scientific Committee in accordance with the Revised Management Procedure and forwarded to, and approved

commercial whaling and this would be subject to an extremely conservative regime. Greg Donovan suggested to me in an interview that under the RMP it is most probable that Japan would be taking far less whales than it currently takes under the system of ‘scientific whaling’¹⁴⁷⁶ - although this presumes that the Japanese would in such a case abandon scientific whaling.

At IWC 46, St Lucia’s Commissioner stated that ‘[t]he RMP is without doubt one of the most remarkable developments in the management of living resources that science has produced’ and that it will, ‘when implemented, have uses and results that will extend far beyond the safe management of whale resources’.¹⁴⁷⁷

However, commercial whaling subject to this new regime has not yet been allowed. According to Victor, the result of whalers coming under pressure from anti-whaling forces ‘was a Revised Management Procedure (RMP) that was extensively reviewed and approved by the IWC’s Scientific Committee’; explaining that the RMP ‘accounts for uncertainties in whale stock measurements and modeling, recognizes ecosystem effects, includes a monitoring scheme, and is built on vastly improved whale stock data’. The RMP has not, however, been implemented. This, Victor suggests, is because the majority of the IWC ‘has opposed any scheme that would allow the resumption of commercial whaling’. ‘Presented with the sober RMP’, he continues, ‘the IWC adopted the procedure but moved the goalposts again’; demanding that ‘a Revised Management Scheme, which would require still further data and assessments and rigorous control and inspection, be developed before commercial whaling would be allowed to resume’. His final assessment is that ‘the cat and mouse game continues because arguing over science and technical matters is easier than confronting deadlock’.¹⁴⁷⁸

Friedheim’s assessment is that ‘[h]ow science has been used in the IWC - and not just recently - is a dismal story’. He comments that ‘the majority of states on the commission ignored the advice of the Scientific Committee, praised its report on the RMP, and initially refused to accept it’; a rejection which ‘led to the resignation of the Scientific Committee’s chair, Philip Hammond’. In a later session, however, he explains, the commission ‘finally did adopt the RMP, but it still refuses to implement it’.¹⁴⁷⁹

8.1.3 Why the RMP has not been implemented

Komatsu and Misaki write that ‘the anti-whaling bloc insist[ed] that a Revised Management Scheme [] to oversee whaling would be required to implement the RMP. As Iceland was so

by the Commission in conformity with all provisions of the Revised Management Scheme; and (iii) commercial catch limits for all other populations in all areas and seasons shall be zero; (12) REAFFIRMS that until all aspects of the Revised Management Scheme are incorporated into the Schedule the Revised Management Procedure should not be implemented; and (13) CONFIRMS that nothing in this Resolution shall be deemed to authorise or give any form of approval to any activity that is contrary to the moratorium on commercial whaling (contained in paragraph 10(e) of the Schedule) or any sanctuary established in accordance with the [ICRW].

IWC Resolution 1994-5 ‘Resolution on the Revised Management Scheme,’ IWC ‘Chairman’s Report of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) at 43-44.

¹⁴⁷⁶ Personal communication Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

¹⁴⁷⁷ St Lucia Commissioner, IWC ‘Report of the Plenary Sessions of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) *Verbatim Record* at 25.

¹⁴⁷⁸ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 295-97.

¹⁴⁷⁹ R L Friedheim ‘The IWC as a Contested Regime’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 22.

disgusted by this prolonged waiting for a re-opening of commercial whaling, it walked out of the IWC in 1992'.¹⁴⁸⁰ Probably, this was not Iceland's only reason for leaving and, of course, the country has since rejoined. Whether it left in a 'fit of pique', as a symbolic gesture, or because it thought that it might be able outside the IWC to gain more benefit and influence others, is unclear. The politics surrounding Iceland's moves are opaque.¹⁴⁸¹ Komatsu and Misaki continue, arguing that '[t]he purpose of adding more and more subject matters to the discussion for development of the RMS is obvious - the anti-whaling bloc never wants to see the RMS completed'. Somewhat cynically, they lament that '[w]hen we succeed in the restoration of commercial whaling, it will be the kind of whaling that would not bring much profit to whalers'; explaining that the cost of whaling is expected to be extremely high given restrictive quotas under the RMP and the RMS rules. The anti-whaling bloc of countries, they conclude, 'are contriving in every possible way to prevent the whaling industry to make profit'.¹⁴⁸²

Burns and Wandesforde-Smith offer a different take on the non-adoption, however. 'Adoption of the RMS', they write, 'a *sine qua non* to lifting the moratorium and establishing new catch limits, has been thwarted primarily by the failure of the parties to agree to the establishment of the International Observer Scheme to monitor whaling operations'.¹⁴⁸³ They record that 'the parties were not able to resolve the outstanding issues relating to the implementation of the RMS at IWC 54, thus, the moratorium remains in place for its seventeenth year [at time of their writing, being 2002]'. They suggest, however, that pressure within the IWC is increasing to adopt the RMS, despite resistance by 'preservationist' parties, 'such as the UK, the Netherlands, New Zealand and Australia, who are likely to oppose lifting the moratorium under any circumstances'.¹⁴⁸⁴

Andresen suggests that the RMP, as agreed to, would probably serve its intended purpose - but he is pessimistic as to its chances of being implemented. The RMP, he writes, 'is among the most technically advanced *and* conservation-oriented procedures that has ever been produced for the management of marine living resources'; and suggests that it has been said of the RMP that, 'viewed as a whole, its status is near the best, and best determined, of any of the world's marine resources'.¹⁴⁸⁵ Thus, he concludes, the 'overall scientific approach of the IWC Scientific Committee could probably serve as a model for most international fisheries commissions, but it is uncertain whether it will ever be put to use by the IWC'.¹⁴⁸⁶

¹⁴⁸⁰ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 92.

¹⁴⁸¹ See, generally, J Viðar Ívarsson (trans. J Cosser) *Science, Sanctions and Cetaceans: Iceland and the Whaling Issue* (1994).

¹⁴⁸² M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 92.

¹⁴⁸³ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 200-201.

¹⁴⁸⁴ *Ibid* at 201.

¹⁴⁸⁵ Andresen is referring to D Butterworth 'Science and sentimentality' (1992) 357 *Nature* 532.

¹⁴⁸⁶ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" Politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 240. On efforts to have the RMS adopted, Friedheim explains that at one stage 'Norway submitted a draft amendment to incorporate the RMS into the Schedule. The draft included a proposed program of supervision and control, the only remaining component of the RMS that needs to be completed and approved. The program was summarily dismissed as inadequate, with no recommendations concerning what should be done to make it acceptable'. R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 317. Norway then apparently withdrew the proposal.

According to Gambell, '[some] IWC signatories believe that a less comprehensive approach to ensuring sustainable whaling operations would prove more effective and create less friction among the parties'; and 'some nations believe that trade in whale products should be the responsibility of [CITES]'.¹⁴⁸⁷ This is a very interesting suggestion, from an experienced commentator - implying, as it does, that one way out of the impasse might be to move from the 'closed environment' of the IWC to the more open one of CITES. CITES does, however, have problems of its own.

At IWC 52 in July 2000, during discussion on the Revised Management Scheme, Japan made reference to a letter received by the IWC Chairman from the Secretary-General of CITES. In the letter, the Secretary-General 'expressed the hope that the IWC would finalise the RMS as quickly as possible'. Japan then suggested that it would 'spare no effort' to come to agreement on the RMS 'through discussion in the Commission'.¹⁴⁸⁸ South Africa commented that 'the case for the IWC to be seen to be making progress towards adoption of the RMS is overwhelming'. In this regard, South Africa referred to 'the concern expressed at the CITES meeting in Nairobi' in April 2000; and to the Secretary-General's letter.¹⁴⁸⁹ This is a slightly odd stance for South Africa to take; in the sense that it is somewhat out of kilter with the views of the country's usual allies at the IWC. It may mean that South Africa was feeling somewhat uncomfortable with its protectionist stance at the IWC, while it was gearing up for a serious effort to downlist its elephant populations at CITES in the same year. Possibly, South Africa was making the right noises to keep Japan and other pro-whaling members of both the IWC and CITES on its side at CITES - perhaps even by hinting subtly, although fairly safely, at a change in its stance at the IWC.¹⁴⁹⁰

At IWC 55 in 2003, the implications were considered of restricting whaling to the 200 nautical mile EEZs of states. The Scientific Committee 'drew attention to the risk-averse nature of the RMP in distributing catches among *Small Areas*'. The SC advised that, under the RMP, the 'restriction of whaling to waters within 200 miles of the coast will have no effect on catches permitted in *Small Areas* that fall entirely or partly within 200 miles of the coast'. Japan argued, however, that restricting whaling to EEZs would 'increase risk as it would concentrate catches on part of a stock'. Japan argued further that if whaling were so restricted then it would become a regional or local activity, and the IWC might become unnecessary. Ireland pointed out that restricting whaling to EEZs had been part of its so-called 'Irish Proposal'; and stressed that it had never claimed that the proposal was based on science. Rather, it had been 'proposed as a practical means of moving forward as a world community to address both the conservation and management aspects' of the ICRW.¹⁴⁹¹

Also at IWC 55, members were divided on the issue of whether progress had been made on the RMS. As examples of the different perspectives, Australia indicated that it would 'continue to offer constructive comments'; while remaining firm in its belief that 'any RMS is

¹⁴⁸⁷ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 75.

¹⁴⁸⁸ IWC 'Chairman's Report of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide) at 32.

¹⁴⁸⁹ *Ibid* at 33.

¹⁴⁹⁰ In 2000, CITES met from 9-20 April; the IWC held its 52nd Annual Meeting from 3-6 July.

¹⁴⁹¹ IWC 'Chairman's Report of the Fifty-Fifth Annual Meeting' (16-19 June 2003, Berlin) at 17-19. See (n 239), (n 442), (n 1599) and (n 2287).

inconsistent with its policy to seek a permanent and global ban of commercial whaling'. Japan, on the other hand, 'recalled that discussions on the RMS have been ongoing for many years'; despite there having been a '1990 deadline in paragraph 10(e) for completion of the comprehensive assessment of whale stocks and consideration of catch limits other than zero'. Japan indicated that it felt that the ever-increasing number of 'elements being added' to consideration of the RMS; 'it was likely that the RMS would never be completed'. Japan argued that it had made 'substantial compromises', but that others were not entering into discussions 'in good faith'; and then argued that there should be a 'clear understanding' that paragraph 10(e) 'would be lifted immediately an RMS is agreed'.¹⁴⁹²

Also at IWC 55, in its written Opening Statement, Norway argued that the (proposed) Berlin Initiative was 'inappropriate and unfortunate' and that, if adopted, it would 'have a destructive effect on the RMS process' and be 'a vicious onslaught on the very integrity of the 1946 Convention'. Norway added that the Initiative 'puts the very credibility of the RMS concept in jeopardy'; and that '[i]t makes one wonder, was the RMS a hoax all along? Was it ever meant to be anything but a decoy, a stalling device?'.¹⁴⁹³

Butterworth advised the present writer at the end of 2006 that Japan's feeling is that many of the requirements apparently demanded by the anti-whaling bloc, in order for the RMS to be approved, are 'ludicrous' and intended not to be accepted. He said, for example, that:

'quite honestly, some of the criteria have been ludicrous ... you do not need 100% observer coverage ... [...] ... if he can't speak the language he's got to have a translator on board ... he's got to operate 24 hours ... he's got to have two translators ... whatever ... Norwegian small-type whaling, there isn't space for that many people on the vessel ... we can't beat you scientifically, so we're just going to beat you economically ... on the other side ... [] ... I can't remember the name ... vessels regularly report to authorities where they are ...'. Question: VMS? 'VMS, yeah ... want VMS on every vessel ...'.¹⁴⁹⁴

8.1.4 IWC 58, 2006

After IWC 58 in 2006, however, it was reported that the proposed intersessional meeting had been held in Cambridge; but that the RMS Chair had noted that, although some further work was agreed on in relation to compliance and the code of conduct for whaling under special permit, the Working Group had agreed that an impasse had been reached in discussions. Accordingly, the Working Group felt that, except for the two activities as suggested, further collective work should be postponed for the time being - although individual governments, or groups thereof, were free to work together as they choose.¹⁴⁹⁵

Various countries then gave their views on the status of the RMS. At the end of the discussion, the Commission 'noted the Working Group's report, accepted that an impasse had been reached at the Commission level and did not identify any formal activity on the RMS for the

¹⁴⁹² *Ibid* at 23.

¹⁴⁹³ IWC 'Opening Statements of the Fifty-Fifth Annual Meeting' (16-19 June 2003, Berlin); written Opening Statement by: Norway (IWC/55/OS/NOR).

¹⁴⁹⁴ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens. 'VMS': 'Vessel Monitoring System' - an electronic tracking system that records all movements that vessels make.

¹⁴⁹⁵ IWC 'Chairman's Report of the Fifty-Eighth Annual Meeting' (16-20 June 2006, St Kitts & Nevis) in G P Donovan (ed)/IWC *Annual Report of the International Whaling Commission 2006: Covering the 2005-2006 Financial Year and the 58th Annual Meeting held in St Kitts & Nevis in 2006* (2007) at 20-25.

coming year'.¹⁴⁹⁶ This diplomatically phrased language means effectively that the RMS (and therefore the RMP too) is, for the time being, stalled - perhaps even permanently.¹⁴⁹⁷

8.2 Whaling for scientific research

8.2.1 *Science and whaling*

According to Martin, '[c]onserving stocks and making whaling a profitable business required a basic knowledge of whales' and efforts to collect information began from the early part of the Twentieth Century.¹⁴⁹⁸ An idea that comes through in several analysts' views, from the early days to the present, is that there is an economic argument to be made that it is impossible for whalers to cause the extinction of whale populations. In Martin's words, '[t]o the sensitive observer [said B Hilder, writing of Norfolk Island, Australia, whaling, in 1958] who is not a Shareholder in a whaling company, the killing of the world's largest and most harmless animals is very sad, but we need have no fear that the species will be killed right off, for when the total number of whales is reduced to half, the chase becomes uneconomical'.¹⁴⁹⁹ Even if true, this is not much of a solace in respect of reduced and damaged biological diversity.

Birnie writes that '[in 1946, i]n pursuance of the US proposals, a concession was made exempting from the regulations of the IWC whales taken and treated under scientific permits that Contracting Governments were allowed to issue for whatever numbers they thought fit'. Governments issuing such permits were required merely to report to the Commission on the permits it granted, not to seek its prior authorisation. This practice, says Birnie, has since been modified and, since 1977, the IWC 'has recommended that scientific permits be submitted to the Scientific Committee for prior comment, since there were allegations that some states abused this concession to evade the increasingly stringent regulations of the Commission'.¹⁵⁰⁰ Despite the SC being able to give prior comment, the position remains that the IWC cannot prevent countries from issuing permits in their discretion. Of course, were the IWC to determine that a party were 'abusing the privilege' - for instance, by taking far more whales than needed, or by taking them for reasons other than genuine research - the legal position might well be seen as different.

It seems that permits for scientific whaling are issued, in Japan, by the Ministry of Agriculture, Forestry and Fisheries - without the Ministry of the Environment playing a formal role.¹⁵⁰¹

8.2.2 *Japan's three research programmes*

Japan's first research programme - JARPA ('Japan Whale Research Programme under Special Permit in the Antarctic') - was an 18-year programme which ran from 1987/88 to 2004/5; and

¹⁴⁹⁶ *Ibid* at 25.

¹⁴⁹⁷ See (n 782).

¹⁴⁹⁸ S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 62-73.

¹⁴⁹⁹ *Ibid* at 177. See (n 140), (n 1320) and (n 1346).

¹⁵⁰⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 190.

¹⁵⁰¹ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 56.

which had as stated objectives the estimation of biological parameters (especially the natural mortality rate) to improve management; the elucidation of stock structure to improve management; the examination of the role of whales in the Antarctic ecosystem; and examination of the effects of environmental changes on cetaceans. It involved the taking of 400 (with 10% variability) minke whales annually.¹⁵⁰²

Japan's second Antarctic research programme - JARPA II - commenced with the first year of a two-year feasibility study in 2005/6. The objectives of JARPA II, as defined by Japan, are to monitor the Antarctic ecosystem; to model competition among whale species and develop future management objectives; to elucidate temporal and spatial changes in stock structure; and to improve the management procedure for Antarctic minke whale stocks. The focus will be on Antarctic minke, humpback and fin whales, and possibly other species in the Antarctic ecosystem that are major predators of Antarctic krill. The intention is that during the two-year feasibility study a maximum of 850 (with 10% variability) minke and 10 fin whales will be taken; with the intention being, during the proposed full-scale research, to take 850 (with 10% variability) Antarctic minke, 50 humpback and 50 fin whales.¹⁵⁰³

Japan also has the JARPN II programme; a long-term research programme aimed at studying feeding ecology in the context of contributing to the 'conservation and sustainable use of marine living resources in the western North Pacific, especially within Japan's EEZ'.¹⁵⁰⁴ Japan's take in the northwest Pacific is a catch that does not ever seem to attract the attention of the NGOs who rail against the Antarctic catch.¹⁵⁰⁵

8.2.3 *Iceland's research programme*

At IWC 55 in 2003, Iceland presented a proposed permit for research - primarily for feeding ecology studies and involving the taking annually of 100 common minke, 100 fin and 50 sei whales in each of two years. In the event, Iceland has issued permits to take 38 common minke whales in 2003, 25 in 2004, 39 in 2005, 50 in 2006, and 39 in 2007.¹⁵⁰⁶

8.2.4 *The research exemption*

Friedheim writes that '[a] controversial form of exception' is the ICRW provision allowing 'scientific whaling'. All of Iceland, Norway, and Japan have exercised their rights under that provision; with all being condemned for it by anti-whaling countries.¹⁵⁰⁷ Norway, says

¹⁵⁰² IWC 59 'Press Release - Day 4 - Thursday 31 May' <http://www.iwcoffice.org/meetings/meeting2007.htm>; and IWC 'Chair's Summary Report of the 59th Annual Meeting (28-31 May 2007, Anchorage, Alaska)'; *Final IWC59 Chair's Summary Report* rev.doc 30 October 2007, see http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC59rev.pdf at 4, fn 2.

¹⁵⁰³ *Ibid* at 4, fn 3.

¹⁵⁰⁴ *Ibid* at 5, fn 4. The programme involves the taking of 150 minke, 50 Bryde's, 50 sei and 10 sperm whales annually in the western North Pacific. *Ibid*.

¹⁵⁰⁵ I am indebted to Peter Sand for this point. Email from P H Sand to E Couzens, 16 September 2008. In a three month season from June to August 2008, Japan's six-vessel fleet, which included the main Antarctic factory ship *Nisshin-maru*, apparently caught 100 sei whales, 59 minke whales, 50 Bryde's whales and two sperm whales. 'Japan Ends Whale Hunt With 211 Catches' *Agence France Press* 22 August 2008; see *ABCNews* <http://www.abcnews.net.au/news/stories/2008/08/22/2344265.htm> (accessed 2 December 2008).

¹⁵⁰⁶ *Ibid* at 5, fn 5.

¹⁵⁰⁷ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 36.

Friedheim, has decided to resume commercial whaling, claiming that their scientific surveys have indicated no shortage of minke whales in North Atlantic waters. They set their quotas in accordance with the Revised Management Procedure'.¹⁵⁰⁸ On the one hand, setting quotas for scientific permits in terms of the RMP makes it more difficult to fault; on the other, it may well have been intended as a provocative act. In the world of the IWC, there are very often hidden motives and much manoeuvring for even minor advantage. Also, this move has the effect of conflating commercial with scientific whaling - something that can hardly ever have been the object of the provision for states to issue permits for scientific research takes of whales.

It is uncertain to what extent such scientific whaling has benefited research. Lapointe argues that '[t]he scientific data gathered by Japanese research vessels has provided the world with a sound scientific basis for a global whale management plan, a much needed conservation tool that has been stalled by Greenpeace and its colleagues for more than a decade'.¹⁵⁰⁹ Gales, Kasuya, Clapham and Brownell, however, write in 2005 that 'Japan's expanded programme will result in annual catches that are more than half the total cumulative catches for scientific research by all nations in the past half-century'; and that '[s]uch takes differ little in scale from commercial whaling, and must be justified by an adequate scientific rationale'.¹⁵¹⁰

'A notable addition to Japan's aims', continue the same authors, 'is to manipulate the ecosystem through selective culling of certain species, with the explicit intention of reducing interspecific competition and thus promoting population growth in the most economically valuable species (such as blue whales)'. At the heart, they say, of Japan's new proposal 'is their hypothesis that whales are competing directly for a limited resource (krill)'. Their criticism of Japan's proposal on the fact that, Japan allegedly ignores the 'fact that current whale populations, and thus their collective consumption of prey, remain at fractions of pre-whaling levels'; and that Japan therefore is able to 'postulate[] that the recovery of depleted blue whales will be negatively affected by population increases of humpback, fin and minke whales (although data on abundance and population trends for all species are highly uncertain or non-existent)'.¹⁵¹¹

8.2.5 *The nature of scientific whaling*

As will be seen, however, Japan does argue that there are significant differences between commercial whaling and its scientific whaling.

At IWC 53 in 2001, in its written Opening Statement, Japan said that '[t]here has been a lot of misinformation concerning whales but perhaps the worst case of misinformation has been the criticism of Japan's whale research programs' and the labelling of these as 'illegal whaling' and 'commercial whaling in disguise'. Members of this Commission, the Statement continued, 'should know that contrary to these claims, Japan's whale research programs are perfectly legal under Article VIII of the ICRW and that the Commission's Scientific Committee has commended both the quality and quantity of data from these programs noting that they are

¹⁵⁰⁸ *Ibid* at 36.

¹⁵⁰⁹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 65.

¹⁵¹⁰ N J Gales; T Kasuya; P J Clapham & R L Brownell Jr 'Japan's whaling plan under scrutiny' (16 June 2005) 435 *Nature* 883 at 883-84.

¹⁵¹¹ *Ibid* at 884.

providing valuable information for the management of whale stocks'. Japan pointed out also that its 'whale research programs pose no risk to the whale populations'.¹⁵¹² The claim of commendation by the SC is put somewhat too strongly. The SC has a tendency to suggest that Japanese research is useful; but not to endorse the claim that it is necessary.¹⁵¹³

Komatsu and Misaki ask: '[w]hat is the difference between research whaling and commercial whaling?'.¹⁵¹⁴ They seek to answer their own question by suggesting that Japan's Antarctic whale research has four components: these being to ascertain the biological parameter values necessary for the management of the minke whale stocks; to elucidate the role of whales in the Antarctic system; to elucidate the effects of the environmental changes to the whales, and to identify the differences of the stocks'.¹⁵¹⁵

The same writers then tell us that '[i]t has been claimed that Japan's research whaling in the Antarctic and the Western North Pacific provides cover for illegal whale meat to be sold in the market'; but that this view is generally promoted 'by groups and individuals who want a complete end to whaling'. They then argue that such groups and individuals claim also that it is impossible to distinguish between illegal meat and meat legally distributed in the Japanese market. They argue next that ceasing research might increase illegal trade in whale meat to supply the demand which is currently met through research whaling. However, they say, 'measures are becoming stricter over the poaching of whales, and the DNA registry of all whales legally caught is a big step forward in identifying illegal products'.¹⁵¹⁶

This is, of course, much the same argument as is made in respect of the poaching of ivory - that all nations should not stop trading ivory simply because certain nations cannot control poaching within their borders, or the trade across their borders; and that it is better to have a legal trade than to risk an increased illegal trade.

8.2.6 *Trust*

The issue of trust provides a serious barrier to rapprochement. Anti-whaling States simply do not trust pro-whaling States, given their rapacious and dishonest behaviour in the past. Per Martin, for example, '[i]n 1994 (*sic*) the Special Adviser to the President of Russia for Ecology and Health, Dr Alexey Yablokov', told cetacean specialists attending a conference in Texas that much, if not all the Soviet Union catch data submitted to the IWC in the 1960s and 1970s was false'. Subsequent to this, in June 2000, 'astonishing' further figures relating to 'the extent of Russian misreporting were announced to the Scientific Committee of the IWC meeting in Adelaide, Australia'.¹⁵¹⁷

¹⁵¹² IWC 'Opening Statements of the Fifty-Third Annual Meeting' (23-27 July 2001, London); written Opening Statement by: Japan (IWC/53/OS/JAP).

¹⁵¹³ See, for instance, (n 1525) and (n 1530).

¹⁵¹⁴ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 138-139.

¹⁵¹⁵ *Ibid* at 139.

¹⁵¹⁶ *Ibid* at 18.

¹⁵¹⁷ S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 92-93. Apparently, 'from the 1957-58 season to that of 1967-68, well after the ban on killing humpbacks, 44 795 humpbacks were killed'; and whereas 'the fleets reported a take of 2 035 to the IWC, ... after the 1963 ban 4 615 were taken'. *Ibid*.

According to Nikonorov, defending the USSR's conduct, at the 1994 Meeting the Russian Commissioner 'on initiative of his own (without any governmental instruction)' made a 'declaration ... that the USSR had misrepresented data on whale harvesting in Antarctic region'.¹⁵¹⁸ However, it was reported at the 1994 Meeting that the Scientific Committee had 'received information' that there had been 'considerable falsification' of original catch records from USSR operations in the Southern Hemisphere. According to the Chairman, the 'Russian Federation indicated that it would provide additional information' when this was available.¹⁵¹⁹ In the event, a Resolution on the Unreliability of Past Whaling Data was passed by the IWC in 1994.¹⁵²⁰

According to the *Chairman's Report* of IWC 47, 1995, the 'first report of massive under-reporting of Soviet pelagic whaling operations was made public by a Russian scientist at the Society of Marine Mammalogy's [] Conference in 1993 ... Professor Alexey V Yablokov'. The Russian delegation in 1995, however, argued that the data had not been submitted officially by the Russian Government.¹⁵²¹

Pro-whaling states do not trust the anti-whaling states either. Consider, for example, the words of the Japanese Commissioner in his (written) Opening Statement to IWC33 in 1982; where he suggested, in respect of North Pacific sperm whale populations, that the previous year a new computer analysis had been used which had indicated that the male population was below the MSY level and that these figures had been used as the basis for reducing the quota. 'Subsequent to the meeting', the Opening Statement suggests, 'Japanese scientists were astonished to find that reiteration of the computer procedure as detailed by the description of the analysis did not produce the conclusion of the authors, and moreover that the analysis contained a number of serious errors in theory, computer programming and data handling. These results were communicated to and acknowledged by the authors'.¹⁵²²

¹⁵¹⁸ I V Nikonorov *Whale Mystery: A Review* (1996) at 5.

¹⁵¹⁹ IWC 'Chairman's Report of the Forty-Sixth Annual Meeting' (23-27 May 1994, Mexico) at 19.

¹⁵²⁰ The text of the Resolution reads:

AWARE that concerns have been raised for many years about under reporting of commercial whale catches; NOTING the importance of having complete historical catch data available for the proper implementation of the RMP; NOTING that earlier this year a Russian Federation official published a report which stated that past whaling statistics submitted by the former [USSR] were unreliable in many aspects; and NOTING that the Russian Federation has made available to the Scientific Committee in 1994 previously unreported data on past Soviet whaling operations in the Southern Hemisphere; Now, THEREFORE, the Commission: (1) CONGRATULATES AND COMMENDS the Government of the Russian Federation for its efforts to locate original catch records from past Soviet whaling activities and to provide these records to the IWC; (2) URGES the Government of the Russian Federation to continue its efforts to secure and provide to the IWC any additional original catch data and positional data from past Soviet catches as may be available and authorises the Secretariat to provide necessary assistance from voluntary funds for this project; (3) INVITES any other IWC Contracting Governments to examine data on their past whaling operations for inaccuracies or falsification and to provide any revised data to the Commission.

Resolution on the Unreliability of Past Whaling Data IWC 'Chairman's Report of the Forty-Sixth Annual Meeting' (23-27 May 1994, Mexico) Appendix 6 at 44.

¹⁵²¹ IWC 'Chairman's Report of the Forty-Seventh Annual Meeting' (29 May-2 June 1995, Dublin) at 35. It seems that Yablokov reported that 'four Soviet factory ships operated in the Southern Hemisphere after World War II. One of these factory ships processed 717 right whales, 1,433 blue whales and 7,207 humpback whales. The USSR had previously reported catches of no right whales, 156 blue whales and 152 humpback whales for the same factory ship. The data was published in *Nature* ...'. *Ibid.* For more information on the incredible scale of Soviet under-reporting of whale catches, see A Darby *Harpoon: Into the heart of whaling* (2007).

¹⁵²² Japan Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/JAPAN at 2.

8.2.7 Ongoing research

Gambell writes that '[s]ince its moratorium decision, the IWC has established detailed guidelines for its Scientific Committee to employ in reviewing and commenting on proposed special permits'.¹⁵²³ However, he goes on, 'critics of Article VIII continue to suggest that special permit catches are being used as mechanisms to circumvent the prohibition on commercial whaling until the moratorium is lifted'. Significantly, perhaps, he suggests that the IWC 'has presented useful information on Japanese operations to its Scientific Committee, although some of Japan's research objectives fall outside IWC research guidelines'; and that 'the Committee has also held special workshops to review and evaluate the results coming from the Japanese research catches'.¹⁵²⁴ It is unclear precisely what Gambell is putting forward here - he appears to be implying that the Japanese research has value; but concentrates more on what the IWC generally has done to assist the Japanese research.

Per Birnie, '[t]he rules governing membership of the [Scientific Committee] are important since its advice is crucial to the functioning of the Commission', the decisions of which are required by Article V(2)(b) of the ICRW to be based on 'scientific findings'. The SC, she says, 'as presently composed, can be said to include almost all the world's leading cetologists'.¹⁵²⁵ This is important. The advice that is being heeded, ignored or manipulated is potentially highly valuable science. The present writer is not a scientist and is not in a position to give informed comment on the SC's findings; however, it is certainly possible that the SC's findings might eventually provide a way out of the political impasse - so long as the SC does not merely provide a majority opinion, according to whichever bloc happens to hold more members at the given time.

Doubleday suggests that 'recently a surprise development has taken place affecting policy development concerning the regulation of whaling and the IWC'; this being that the 'US Marine Mammal Commission (a governmental oversight body based in Washington, DC) has proposed for the first time that non-scientific criteria be considered as a basis for making decisions about the resumption of commercial whaling, on the grounds that non-consumptive uses of whales have attained higher commercial value than have consumptive uses'. This proposal, according to Doubleday, 'suggests that the US 'is considering using its political and economic power to force international compliance with the dictates of the anti-harvesting lobby and that it views this ideology as providing a credible basis for making decisions about the utilization of living resources'. The proposal, she continues, 'suggests renegotiation of the ICRW leading to a convention recognizing the primacy to be afforded these non-consumptive values'.¹⁵²⁶ It is not clear, however, whether the United States has actually (formally) *suggested* a renegotiation of the ICRW. This seems unlikely. In the world of international

¹⁵²³ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 80. Gambell explains that '[t]hese guidelines concern the objectives of the research, and the means through which they relate to the Commission's needs; the methodology and procedures to be instituted, including the whales to be taken, and the feasibility of using non-lethal techniques; the effects of the catch on the stock(s); and the arrangements for participation by scientists from other countries. The IWC may make recommendations to the respective governments, although it has no authority to forbid or rescind the issuance of permits'. *Ibid* at 80.

¹⁵²⁴ *Ibid* at 80.

¹⁵²⁵ P Birnie 'The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 129-30.

¹⁵²⁶ N Doubleday 'Arctic Whales: Sustaining Indigenous Peoples and Conserving Arctic Resources' in M M R Freeman & U P Kreuter (eds) (1994) 241 at 254-255.

politics, the United States seems to hold its cards closer to its chest than this - a suggestion which would be tantamount to admitting that the IWC is not working as it should.

8.2.8 *Commercial whaling disguised?*

Amongst those who believe that scientific whaling is little more than a ruse, a cover, under which to continue commercial whaling is Day, who writes that one may well ask how this system of 'scientific' whaling differs from commercial whaling; with his answer being that it simply does not. Many in the IWC have asked, he says, 'why conservationists are determined to end *all* commercial whaling, wondering why there is no room for flexibility. They feel that a carefully controlled, sustained harvest of whales is perfectly possible'. He then explains that this argument 'has held the UN ban on whaling at bay since 1972' and has resulted in the slaughter of hundreds of thousands of whales'.¹⁵²⁷

Butterworth, however, told me that in the in the 1990s the Japanese 'came on board with the science'; and 'said we want to do it properly, maybe we haven't done it so well in the past, we'll try and do a better job of it'. However, in his view the Japanese have since 'come out of' that process; saying, cynically, '... it doesn't matter, we've tried to play ball on the science ... it made no damn difference, look at what happens ... the RMP ... we've done everything that was asked of us ... the only thing that matters is how many votes there are ...'.¹⁵²⁸

On the issue of whether scientific permit whaling is justified or not, Butterworth said that there 'certainly [is] policy involved in this as well' in the sense at least of keeping the industry functioning, even if at a low level - he described this as being 'a concern'. On the question, however, of whether scientific whaling is 'commercial whaling in disguise', he argued firmly that it is not. In this regard, he explained that the Antarctic whaling is subsidised, and that subsidies would not be needed 'if you could go down there and do it commercially'. According to him, the Japanese fleets are 'doing the whaling in a scientific way and they're covering the whole area'; whereas 'if you just wanted to catch you would go down to the places where the highest concentrations are', instead of having 'your fleet sailing up and down 300 miles' and going 'where the densities are very low'.¹⁵²⁹

8.2.9 *Cooperation between the United States and Japan*

Birnie writes, recently, that 'the question of competition between cetaceans and fisheries [has] also [been] on the agenda. The SC agreed on the importance of using models to answer questions concerning whether removing marine mammals from an ecosystem increases fish yields and, conversely, whether reducing fish yields would accelerate the recovery rate of depleted cetaceans stocks. It proposed a brief Workshop to consider the questions involved'. She then records that although the US apparently thought that the view that whales have caused declines in fish stocks was 'oversimplified and biologically unsound' and the country 'was concerned that the issue was put before a body not recognized as having competence in

¹⁵²⁷ D Day *The Whale War* (2nd ed, 1992) at 164-66.

¹⁵²⁸ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

¹⁵²⁹ *Ibid.*

management of whale stocks, it accepted that these were appropriate issues for consideration by the SC'.¹⁵³⁰

The US, it seems, therefore approved of the Workshop proposal and also proposed, jointly with Japan, a Resolution on Interactions Between Whales and Fish Stocks. Norway, however, noted that the issue 'was already being addressed in a Workshop convened by NAMMCO with Canadian participation'. New Zealand proposed that there be review also of the 'impact of fisheries on cetaceans through by-catch and prey depletion'; thus suggesting a turning around of the debate. The SC Chairman advised that, when attempting to answer these questions, the Workshop would 'take a full ecosystem approach, looking at the full range of interactions between fisheries and cetaceans'; and would also interpret 'fishing' in a broad sense, to include the study of other marine resources such as krill, and 'would consider whatever data were appropriate to examining the ecosystem models'. The UK noted that any multispecies ecosystem approach should include consideration of environmental threats and concerns.¹⁵³¹

The joint US/Japan resolution on the complicated issue of interactions between whales and fish stocks, which Birnie understates by describing as 'unusual', indicated (probably, says Birnie, with current FAO initiatives in mind) that the IWC was prioritising this issue and that 'any studies on ecosystem based fisheries management undertaken by FAO must be holistic and balanced in approach'. The Resolution endorsed the idea of the proposed SC Workshop; and 'asked the IWC Secretary to seek cooperation with FAO'.¹⁵³²

Although Birnie describes the joint resolution as 'unusual', it is not unprecedented for Japan and the United States to work together within the IWC - *vide*, for example, the October 2002 intersessional IWC meeting. This might be seen as hypocrisy by both, particularly by the US; but could also be seen optimistically as both States balancing the desirability of keeping the international system functioning, with the need to protect their interests as best they can. It is interesting also to see the SC declaring that it will take an 'ecosystem' approach. Although this might allow opponents of whaling to delay matters by insisting on ever more factors that need to be considered; it is, as discussed elsewhere, the pro-whaling States which have sought most to emphasise an 'ecosystem' approach. Martin does write that '[t]he major threat to humpback whales and their habitats is no longer from whaling, but from environmental challenge'.¹⁵³³ This does, at any rate, presage the possibility that two of the most important adversaries might eventually find common ground.¹⁵³⁴

8.2.10 Different views as to the nature of scientific whaling

'The IWC', according to Burns and Wandesforde-Smith, 'has consistently called upon Japan and other parties that have conducted scientific whaling activities to desist, on the grounds that such research is not essential for rational management of stocks and does not address critical

¹⁵³⁰ P Birnie 'The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 133-34.

¹⁵³¹ *Ibid* at 133-34.

¹⁵³² *Ibid* at 133-34.

¹⁵³³ S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 232-33.

¹⁵³⁴ See 17.1.

research needs'. However, they add, 'Japan has rebuffed the parties' requests on the grounds that IWC Resolutions are non-binding under the terms of the ICRW, and that Article VIII vests the individual parties with the ultimate discretion in issuing the permits'.¹⁵³⁵ However, it is arguably somewhat disingenuous for the writers to claim that it is *the IWC* which has called upon Japan to stop. While technically correct, perhaps, this overlooks the fact that such a 'call' would have been made simply by a majority (perhaps even a slim majority) of members in the divided organisation.

At IWC 54 in 2002, a *démarche* was presented to the Japanese Government; on behalf of the governments of Argentina, Australia, Austria, Brazil, Chile, Finland, France, Germany, Ireland, Peru, Mexico, Monaco, Netherlands, New Zealand, Spain, Sweden, the UK and the USA. In the *démarche* the governments 'strongly reject[ed] Japan's recently-announced JARPEN II unilateral scientific research program'; to be 'undertaken under the auspices of the [IWC]'. The *démarche* stated that the governments considered 'Japan's actions as undermining the authority of [the] IWC, and as designed to undo the decades of progress that have achieved the substantial level of protection that whales enjoy today'. The *démarche* indicated that the governments 'reaffirm their strong commitment to the conservation of whales'; whilst 'rejecting commercial whaling and opposing any measures that imply undermining the moratorium on whaling adopted by the [IWC]'.¹⁵³⁶

Komatsu and Misaki write that the criticism of Japan's research [as 'the cover for commercial whaling'] is, firstly, 'a denial of the provision of ICRW providing for research'; and, secondly, a 'denial of the rationale for the moratorium'. Article VIII of the ICRW, they say, 'clearly provides the sovereign right of a member nation to undertake whale research involving lethal methods, and further requires that product obtained from the research must be used without waste under the sovereign nation's guidance'.¹⁵³⁷ 'While the Scientific Committee', they continue, 'is reviewing the results of JARPA and JARPEN, and evaluating their scientific merits by setting the stage for the advancement of whale science and recommending the continuation of it, the commission itself is denying not only the value of it but also the right of the sovereign nation afforded by the convention'. This fact alone, they conclude, 'is [] evidence of the dysfunction of the present-day IWC'.¹⁵³⁸

Iino and Goodman claim that both of the moratorium and the Southern Ocean Sanctuary apply only to commercial whaling, and do not apply to research whaling; and therefore claims that Japan is violating [either] have no proper legal basis. They argue also that it is long-term research programmes which are required properly to assess ongoing changes 'of various population parameters since sampling for only one or two years does not tell you what is going on in a dynamic system'.¹⁵³⁹ Scientific research, they say, is critical to the IWC as

¹⁵³⁵ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 202-203.

¹⁵³⁶ IWC Draft Resolutions of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki): Press communiqué on the *démarche* presented to Japan (IWC/54/24).

¹⁵³⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 143.

¹⁵³⁸ *Ibid* at 144.

¹⁵³⁹ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 16.

Article V of the ICRW requires that regulations made by the IWC be ‘based on scientific findings’.¹⁵⁴⁰

Burke argues that the principle that the IWC must be guided by the best scientific evidence available ought to be given greater weight than it is currently given in implementation of the ICRW. This, he says, is no longer only a matter of ‘highly desirable policy’; but ‘is also mandated by UNCLOS and should be considered to reflect general international law binding on all states’. In support of this, he points out that Article 119 of UNCLOS declares that when conservation measures for fisheries on the high seas are established, states must ‘take measures which are designed, on the best scientific evidence available to the states concerned’. In any context, he argues, other than that currently persisting in the IWC, ‘where science is often irrelevant for specific decisions’, it would be obvious that actions ‘must take account of the best scientific evidence available’. To allow this situation to continue, he concludes, ‘will threaten not only whales but, if the credibility of the treaty implementation process is sufficiently undermined, perhaps other significant environmental problems’.¹⁵⁴¹

It may be that the elephant ivory debate is, however, an example of the same problem - providing further linkage of the species. In both cases, arguably, science is being ‘ignored’ or even ‘manipulated’.

8.2.11 Ongoing research

Iino and Goodman add that ‘[i]t should be no surprise that the fundamental basis of Japan’s fisheries policy is that management decisions should be based primarily on scientific findings. This principle is reflected in the [UNCLOS], Agenda 21, the Kyoto Declaration [on Fisheries and Food Security], the FAO’s Code of Conduct for Responsible Fisheries and ... Article V of the ICRW’.¹⁵⁴² It appears, however, to the present writer that there may (strongly arguably) be some ‘abuse’ of the ‘ecosystem argument’ here. It is clear that it is being linked to the idea that taking an ecosystem approach means finding that whales and humans are in conflict. It also arguably presupposes *maximised* taking from the sea.

Payne argues that much more than is generally realised can be learned from non-intrusive techniques. Whereas, according to the accepted doctrine of 20 years ago, ‘most major advances in cetology were made by taking a broad stance on the flensing platform and dissecting ever deeper into the abundant corpses’; in fact the argument ‘for more research on cadavers was self-perpetuating because it had a neat catch, sometimes put forward by whaling industry spokesmen as an argument in favor of whaling: since serious science cannot be done without dead whales, the industry should be retained if only for its valuable contribution to knowledge’.¹⁵⁴³ However, some serious gaps in our knowledge of whales’ life histories ‘were still with us in the 1960’s and 1970’s when these species were declining precipitously and when better answers were urgently needed to stop that decline’. In other words, he concludes,

¹⁵⁴⁰ *Ibid* at 18.

¹⁵⁴¹ W T Burke ‘A New Whaling Agreement and International Law’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 72.

¹⁵⁴² Y Iino & D Goodman ‘Japan’s Position in the International Whaling Commission’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 9.

¹⁵⁴³ R Payne ‘Introduction’ in R Payne (ed) *Communication and Behavior of Whales* AAAS Selected Symposium 76 (1983) 1 at 2.

‘even when we had hundreds of thousands of corpses from which to derive data, the answers to some very simple questions (the consequences of which are nevertheless very important) were not forthcoming’.¹⁵⁴⁴

Victor argues that the problem of whaling is not a scientific problem; rather, that the whaling regime is in crisis because the basic objectives of whale ‘preservationists’ are incompatible with those of whale ‘conservationists’, who want to resume commercial whaling’.¹⁵⁴⁵ Andresen essentially supports this, suggesting that ‘[t]here is a real danger that many of the most able scientists, having elaborated the [RMP], may avoid future involvement in the IWC’. Some scientists, he says, ‘left in the 1980s, and the chairman of the Scientific Committee resigned in 1993. For any good architect of new important structures, it would be demoralizing never to see your work put to use’. Scientists, he says, have essentially finished their most important work through completion of the comprehensive assessment and the [RMP]’.¹⁵⁴⁶

8.2.12 Objections

Aron, Burke and Freeman argue that ‘[a] recent open letter signed by a number of distinguished scientists ... provides yet another example of scientists’ imprudence and irresponsibility in regard to making public pronouncements’. The letter was apparently published as a full-page advertisement in the *New York Times*,¹⁵⁴⁷ and signed by 21 scientists, including three Nobel laureates. ‘The error-filled letter’, according to Aron, Burke and Freeman, claims that Japan’s whale research is bogus on the ground that it does not meet ‘minimum standards for credible science’; with ‘lack of relevancy for management, refusal to release information for independent review, and lack of testable hypotheses’ being cited in

¹⁵⁴⁴ *Ibid* at 2.

¹⁵⁴⁵ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 293. This use of the terms ‘preservationist’ and ‘conservationist’ is the use chosen by the present writer for the purposes of this thesis.

¹⁵⁴⁶ S Andresen ‘The Whaling Regime: “Good” Institutions but “Bad” politics?’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 249.

¹⁵⁴⁷ The letter was apparently dated 20 May 2002 and ‘can be read at www.wwfus.org’. W Aron; W T Burke & M M R Freeman ‘Science and Advocacy: A Cautionary Tale from the International Whaling Debate’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 87 at 89-90; fn 12: World Wildlife Fund. The ‘open letter’ is worth, however, quoting in full as it sets out clearly many of the objections which the anti-whaling bloc has to whaling. It must be conceded that the letter *is* flawed:

... Open letter to the government of Japan on “Scientific Whaling”: Despite its obligation to comply with a global moratorium on commercial whaling, Japan has killed thousands of whales over the past decade, claiming an exemption for “scientific whaling” under international law. We, the undersigned scientists, believe Japan’s whale research program fails to meet minimum standards for credible science. In particular: We are concerned that Japan’s whaling program is not designed to answer scientific questions relevant to the management of whales; that Japan has refused to make the information it collects available for independent review; and that its research program lacks a testable hypothesis or other performance indicators consistent with accepted scientific standards. Most of the data being gathered by Japan’s “scientific whaling” are obtainable by non-lethal means; it is possible, for example, to determine species, gender, population size, migration patterns, stock fidelity, and other key biological information without harming whales. Yet Japan’s whale research program kills hundreds of whales each year in the absence of a compelling scientific need. The commercial nature of Japan’s whaling program conflicts with its scientific independence. Japan sells meat from the whales it kills on commercial markets and assigns “scientific whaling” quotas to individual whaling villages. These commercial ties create a profit incentive to kill whales even when no scientific need exists, raising troubling questions about the motives behind Japan’s program. Japan has announced it will soon begin killing sei whales, an internationally listed endangered species, ostensibly to determine the whales’ diet. Yet Japan has already analyzed the stomach contents of nearly 20 000 sei whales it killed during the past fifty years. There is no reasonable likelihood that killing additional whales now will add to what is already known about their diet. By continuing to fund and carry out this program, Japan opens itself to serious charges that it is using the pretense of scientific research to evade its commitments to the world community. As scientists, we believe this compromises objective decision-making and undermines public confidence in the role of science to guide policy. Accordingly, we respectfully urge the Japanese government to suspend its “scientific whaling” program.

support. These, the three authors comment, ‘are serious accusations to level against, *inter alia*, the many leading whale scientists in the IWC Scientific Committee who critically review Japan’s research program in order to determine its management relevance and scientific merit’.¹⁵⁴⁸ The open letter, they say, ‘wholly misunderstands general international law concerning whaling’; and ‘erroneously charges that Japan claimed an exemption for scientific whaling under international law’ whereas ‘under general international law, any nation has the right to take whales for food or research purposes and needs no exemption’.¹⁵⁴⁹ Further, they explain, ‘Japan is a party to the ICRW, Article VIII of which specifically authorizes scientific whaling notwithstanding the ban placed on commercial whaling. Under no acceptable circumstances can compliance with a treaty constitute a violation of its provisions’.¹⁵⁵⁰

It might of course be argued to counter this that current Japanese research whaling is not genuine; or, even if genuine, that too many whales are being taken and that there is not therefore compliance with the ICRW.

Gales, Kasuya, Clapham and Brownell largely concur with the views expressed in the ‘Open Letter’; writing that ‘[i]t is time for the IWC to review the provisions of the International Convention under which scientific whaling permits are issued’. Their argument is that ‘[s]cience is stipulated as the basis of management procedures within the IWC. But the lack of a science-based regulatory process to manage scientific whaling, and the escalation of this whaling to commercial scales on the basis of poorly established and controversial scientific claims, challenge the idea that the IWC can deliver a robust framework for whale conservation or a sustainable whaling industry’.¹⁵⁵¹

When it comes to CITES, decisions to list species and populations on its Appendices are based on the new criteria [] contained in Res. 9.24, which consists of 5 Annexes as well as the resolution itself.¹⁵⁵²

8.2.13 *Past and future takings*

It seems that from 2008 Japan’s catch quotas will see up to 1 415 whales taken annually - mostly from the Southern Ocean Sanctuary area.¹⁵⁵³ This compares with 273 whales having been taken in 1988.¹⁵⁵⁴ Sand records that, from 1988 to 2007, 10 857 whales were taken under the auspices of Japanese scientific permit whaling - compared to approximately 2 100 whales having been taken under the same auspices by all of the world’s states in the period 1948 to 1987.¹⁵⁵⁵

¹⁵⁴⁸ *Ibid* at 89-90.

¹⁵⁴⁹ *Ibid* at 91-93; fn 29: referring to Jacobson in *Toward a Sustainable Whaling Regime* citing the 1982 UNCLOS and the 1958 Convention on the High Seas.

¹⁵⁵⁰ W Aron, W T Burke & M M R Freeman ‘Science and Advocacy: A Cautionary Tale from the International Whaling Debate’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 87 at 93-94.

¹⁵⁵¹ N J Gales, T Kasuya, P J Clapham & R L Brownell Jr ‘Japan’s whaling plan under scrutiny’ (16 June 2005) 435 *Nature* 883 at 884.

¹⁵⁵² ‘CITES and the IWC: The Fall of Conservation? The Downlisting of Minke Whales in the North Atlantic’, High North Alliance Publication issued in conjunction with the 1997 CITES meeting in Harare, available on <http://www.highnorth.no/Library/Trade/CITES/ci-an-iw.htm> (accessed 12 May 2006) at 7.

¹⁵⁵³ P H Sand ‘Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)’ (2008) 17:1 *RECIEL* 56 at 56.

¹⁵⁵⁴ *Ibid*.

¹⁵⁵⁵ *Ibid* at 56-57.

8.2.14 *Comment on legality*

These figures provide probably the best basis for anti-whaling IWC members to criticise the Japanese scientific whaling effort as illegal. Since scientific permit whaling is a right provided for in the ICRW, it is difficult to describe it as a contravention of the moratorium (the ‘zero quota on catches’) - and it is difficult even to describe a ‘right’ as a ‘loophole.’ To do so would require demonstration that the right is being abused; and that it has therefore become a loophole, at best.¹⁵⁵⁶

The Japanese response, however, might be that the situation has been forced upon them by the imposition of the zero quota in s10(e) of the Schedule to the ICRW - in other words, that increased scientific permit whaling is necessary in order to determine, through research, whether the zero quota remains necessary.

Scientific research into whaling, particularly into populations statuses, has always been recognised as an essential feature of the work of the IWC. Since the coming into effect, in 1985/86, of the moratorium, however, whaling under scientific permit has taken on increased importance. It has become something of a mantra amongst anti-whaling parties, and other anti-whaling forces, that Japanese research whaling is ‘bogus’ and designed rather to keep the market for whale meat thriving. In the absence of a body, the equivalent of an upper Court in a national legal system, with the jurisdiction in international law to make such a finding, however, it remains impossible to state conclusively that the ‘scientific permit exemption’ is being abused. The ‘jury is equally out’ on whether the scientific research which the Japanese undertake represents genuine scientific research or not.

‘Research whaling’ remains probably the biggest bone of contention between the pro- and anti-whaling Members. On the other hand, that Japan can continue to take substantial numbers of great whales annually despite the ‘moratorium’ may well be a factor contributing to a certain sense of stability - as long as it is able to use this ‘loophole’ Japan does not have a real incentive to leave the ICRW, a move which would potentially cause the Treaty to collapse.

8.3 The North Atlantic Marine Mammal Commission

8.3.1 *The nature of the Treaty*

Hovelsrud-Broda writes that in 1992 (after having signed a Memorandum of Understanding in 1990) ‘[t]he four parties to NAMMCO (Faroe Islands, Greenland, Iceland and Norway) formulated the NAMMCO Agreement to foster marine ecosystem research and to better understand the role of marine mammals in this system’.¹⁵⁵⁷ The nations, she says, ‘attending the [five] conferences [that led to NAMMCO] were interested in fostering multi-species and

¹⁵⁵⁶ Professor Lars Walløe, Head of Science, Norwegian Delegation to the IWC, told me in an interview that the original intention behind the inclusion of the exemption for scientific permit whaling had been that only very small numbers of whales be taken. *Personal communication* Interview with Lars Walløe, Oslo, 24 April 2007; E Couzens. Walløe made the point to me off the record; however, the same point appears (attributed to Walløe) in P H Sand ‘Japan’s ‘Research Whaling’ in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)’ (2008) 17(1) *RECIEL* 56 at 57.

¹⁵⁵⁷ G Hovelsrud-Broda ‘NAMMCO - Regional Cooperation, Sustainable Use, Sustainable Communities’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 143 at 143. See <http://www.nammco.no>, generally.

ecosystem management approaches in the North Atlantic'; and explains that 'this emphasis on conservation was partly in response to, and in pointed contrast with, the increased support for a preservationist approach by many parties to the [IWC]'.¹⁵⁵⁸

8.3.2 NAMMCO as an alternative

Friedheim supports the view that NAMMCO provides an alternative to the IWC, writing that '[NAMMCO] remains in the wings as a potential rival organization'; and that 'there are strong pressures in NAMMCO to become an allocating agency'. To this point, he argues, Norway, 'playing a more subtle game than the other members of this High North group, allows expertise to be created in the organization but prevents it from substituting for the IWC'.¹⁵⁵⁹ As an additional linkage, importantly for the present thesis, Friedheim then tells us that in addition, apparently, the (Norwegian) Foreign Minister 'proposed that Iceland join [CITES] in order to fight the listing of abundant whale species' as though they are 'threatened with extinction'.¹⁵⁶⁰

This is very interesting, given that Iceland acceded to CITES on 3 January 2000 - the date of entry into force for Iceland being 2 April 2000.¹⁵⁶¹ As Iceland sought to rejoin the IWC at the Meetings of 2001 and 2002,¹⁵⁶² it seems clear therefore that Iceland had made the decision to come back into the fray quite 'aggressively' - and to push linkages between treaties.¹⁵⁶³

This point is interesting also given that Doug Butterworth recently told me that NAMMCO had been considering linkages with CITES,¹⁵⁶⁴ given that the High North Alliance has raised such linkages;¹⁵⁶⁵ and given that several people in Norway - and Norway's Commissioner to the IWC, Karsten Klepsvik¹⁵⁶⁶ - have told me that Norway sees the linkage with CITES as significant.

The present writer asked Butterworth about NAMMCO, putting forward the idea that it is a strange treaty, having been signed by the Fisheries authorities of countries, rather than the countries themselves; and asking to what extent the treaty is supported by Denmark, which is not itself a party. Butterworth described Denmark as being 'in a very awkward position' and suggested that if it was not for the 'pressures from the other members of the EU, Denmark would quite possibly swing the other side'. Thinking in the late 1980s and early 1990s on Norway, he added, was that 'Norway would soon become a member of the EU' and that whaling would then 'be a thing of the past because that will be a condition'; but that what was 'not expected was the vote against that'. Canada, he said, 'stays in the wings' of NAMMCO and 'watches to see which way the wind is blowing'.¹⁵⁶⁷

¹⁵⁵⁸ *Ibid* at 145.

¹⁵⁵⁹ R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 312-13.

¹⁵⁶⁰ *Ibid* at 312-13; referring, in fn 4, to *HNWNews* 11 March 1999.

¹⁵⁶¹ 'List of Contracting Parties' <http://www.cites.org/eng/disc/parties/alphabet.html> (accessed 31 May 2008).

¹⁵⁶² See 3.3.8, 3.3.9, 3.3.10 and Annex C.

¹⁵⁶³ This is only my deduction, obviously. While Iceland appears to wish to trade, the country does not appear to have put forward any resolutions/proposals on whaling at CITES (or on CITES at the IWC) as Japan and Norway have done.

¹⁵⁶⁴ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

¹⁵⁶⁵ Email from D Butterworth to E Couzens; 8 December 2006. See (n 1567), (n 1568) and (n 1569).

¹⁵⁶⁶ *Personal communication* Karsten Klepsvik, Norway's Commissioner to the IWC, Anchorage, 30 May 2007; E Couzens. [Note: this was not a formal interview.]

¹⁵⁶⁷ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

Asked what NAMMCO was proposing, in respect of CITES, Butterworth suggested simply that NAMMCO is ‘waiting in the wings as a potentially viable whale management [body]’.¹⁵⁶⁸ Asked more specifically, how NAMMCO felt that it might be able to make use of CITES, Butterworth explained that, unlike the IWC, NAMMCO ‘has claimed a responsibility for small cetaceans;’ something which he felt ‘no one is going to object to’. Basically, he seemed to feel that the point would be for the pro-whaling bloc of countries to have another body in which to demonstrate that it has a moral majority, and that its desires are not against world opinion - having the support of 50% of CITES, and perhaps of the CITES Animals Committee, would help to make this clear.¹⁵⁶⁹

Iino and Goodman write that ‘[t]his regime could ultimately assume the functions of the IWC if the IWC continues to reject a resumption of properly managed catches of whales from abundant stocks’.¹⁵⁷⁰ Freeman comments that ‘[i]t appears that these regional bodies, operating on the basis of consensus and shared conservation objectives, benefit from the greater degree of cultural understanding that a regional regime allows’.¹⁵⁷¹

Schiffman writes that ‘[w]hether or not NAMMCO, the World Council of Whalers,¹⁵⁷² or any other pro-consumptive organization in the marine mammal arena will satisfy the role that UNCLOS contemplates for international or regional organizations is an open question at this point. Thus far, no organization other than the IWC has put forth regulations for the taking of cetaceans’. He then points out that while NAMMCO’s activities are confined to knowledge-building, they would seem to be consistent with UNCLOS; but that if NAMMCO were to ‘move toward regulation of consumptive utilization in the future, a crucial issue will be whether its scheme comports with all of the requirements of UNCLOS, as well as other key obligations of international law’.¹⁵⁷³

It must be queried, of course, whether this is or ever has been the object of NAMMCO. Its role might be a more limited and strategic one. While it might eventually be one of a number of regional organisations that play a role in managing whale stocks; its scope would seem far too limited ever to be a viable global *replacement* for the IWC.

‘The more likely scenario’, in Schiffman’s view, ‘is one where Norway, Iceland or any other state that might hold membership in both organizations, uses its NAMMCO membership as political leverage to undercut the IWC’s more preservationist agenda’.¹⁵⁷⁴ Schiffman adds to this, asking whether there ‘are [] any legal principles that would favor one regime over the other? After all, Article 65 of UNCLOS does not specify which international organizations are competent to manage cetaceans’. He contends, however, that there is some ‘collateral evidence of the primacy of the IWC in cetacean management’. Agenda 21’s Oceans Chapter, he says, recognises the IWC in this role, although still not precluding other organizations. In addition,

¹⁵⁶⁸ *Ibid.*

¹⁵⁶⁹ *Ibid.*

¹⁵⁷⁰ Y Iino & D Goodman ‘Japan’s Position in the International Whaling Commission’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 31.

¹⁵⁷¹ M M R Freeman ‘Culture-Based Conflict in the International Whaling Commission: The Case of Japanese Small-type Whaling’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 33 at 36-37.

¹⁵⁷² See www.worldwhalers.com, generally.

¹⁵⁷³ H S Schiffman ‘The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 159 at 175-76.

¹⁵⁷⁴ *Ibid* at 183.

he then points out, CITES, with 160 state parties at the time of his writing, also ‘recognizes the primacy of the IWC on matters of cetacean conservation’.¹⁵⁷⁵ This point, CITES’ recognition of and acknowledgement of the IWC, is an important one. As long as CITES continues so to recognise the IWC, there will be a vital role for *both* organisations to play.

8.3.3 Conclusion

There are some possibilities that frustrated pro-whaling Members might eventually decide to leave the ICRW - one of the most significant of such possibilities coming in the form of the creation of NAMMCO, which has been used here as an example of a body with the potential eventually to become a regional rival to the IWC. At present it is unlikely that this will happen; but, should the ICRW collapse, it seems to me more likely that it would be replaced by a number of regional instruments than another single-issue, umbrella-type MEA. That Norway would prefer a regional whaling management regime over the current global regime was confirmed for me by Halvard Johansen and Turid Eusebio in an interview. They reacted with alarm to the prospect of greater involvement with the Convention on Biological Diversity, for instance.¹⁵⁷⁶

8.4 The Pelly Amendment and the Packwood-Magnuson Amendment

8.4.1 Domestic laws in the United States

Within the United States, two domestic laws¹⁵⁷⁷ have had an important impact on the IWC - although their impact has probably stemmed more from their impact as potential, rather than as actual, threats. In other words, the shadow they have cast over the whaling debate is what has had an effect; rather than their actual invocation. The point of the two Acts is to encourage compliance with strictures of the IWC, protective of the United States’ stance on whaling, by enabling the US to hinder states in non-compliance with the IWC from fishing in US waters.

Lyster writes that ‘[t]he threat of sanctions is undoubtedly a much greater incentive for the whaling States to comply with IWC decisions than the other enforcement mechanisms established by the Whaling Convention because the US government has the power, if it chooses to exercise it, to inflict serious economic losses on States which flout IWC decisions’.¹⁵⁷⁸

¹⁵⁷⁵ *Ibid* at 180.

¹⁵⁷⁶ *Personal communication* Interview with Halvard Johansen and Turid Eusebio, Oslo, 23 April 2007; E Couzens.

¹⁵⁷⁷ The two US laws are known as the “Pelly Amendment” to the Fisherman’s Protective Act of 1967 [fn 90: 22 U.S.C. §§1978 (Supp. V 1981)]; and the “Packwood-Magnuson Amendment” to the Fishery Conservation and Management Act of 1976 [fn 91: 16 U.S.C. §§ 1821(e)(2) (Supp. V 1981)].

¹⁵⁷⁸ S Lyster *International Wildlife Law* (1985) at 34-5. Lyster explains that ‘[i]f the US Secretary of Commerce determines that foreign nationals are “conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program” or “directly or indirectly, are engaging in trade or taking which diminishes the effectiveness of any international program for endangered or threatened species”, the Pelly Amendment authorises the US President to prohibit the import of fish products from the offending State “for such duration as he deems appropriate and to the extent that such prohibition is sanctioned by the [GATT]”. If the president does not impose import restrictions following such a determination by the Secretary of Commerce, he must give his reasons to the US Congress. Under the Packwood-Magnuson Amendment, if the Secretary of Commerce determines that foreign nationals “directly or indirectly, are conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of” the Whaling Convention, the State concerned will automatically lose 50% of its allocation of fish products within the USA’s “fishery conservation zone” which extends 200 miles from US coastlines. If the State refuses to rectify its conduct within a year, its entire allocation will be terminated and its nationals will be unable to fish at all in US coastal waters. In

‘In the mid-1970s’, continues Lyster, ‘there was some doubt as to whether the US government had the political will to impose economic sanctions on a foreign country such as Japan, with whom its general trading relations are so important, merely for the sake of whales’. As evidence of this doubt he points out that in 1974, after Japan and the USSR had both objected to IWC quotas for the harvest of minke whales in the Antarctic and had set their own higher quotas, the Secretary of Commerce ‘made the appropriate determination under the Pelly Amendment’; but that the President then refused ‘to exercise his option to impose sanctions on the grounds that he expected Japan and the USSR to abide by future quotas and that domestic disruption would follow’. On the first point, says Lyster, history proved him to have been correct; but on the second point it ought to be accepted that there will always be some ‘adverse internal economic effect whenever sanctions are applied’.¹⁵⁷⁹ United States politics is as complicated internally as externally, it would appear. Lyster may also be wrong to describe the US President as having declined to exercise an ‘option’ - arguably, the President had a legal obligation.

A sense of aggrievement can be sensed in the reactions to the domestic legislation from certain, essentially pro-whaling, commentators. Friedheim suggests that ‘[t]he chief public enforcer’ is the US through the Pelly amendment to the US Magnuson Fisheries Act, which authorizes the diminution or elimination of miscreants’ fishing rights in the US Exclusive Economic Zone (EEZ), and, if that is not enough, ‘they can be subject to unilateral trade sanctions’.¹⁵⁸⁰ It must be asked, however, whether ‘rights’ is indeed the correct word? Is an entitlement being taken away? The present writer doubts whether the use of the word is correct.¹⁵⁸¹ Those opposed to the protectionist role of the US claim that the State is acting illegally (or at least improperly), but all ignore the fact that the United States is acting only within its *own* waters. To argue that by banning foreign vessels for this reason it is contravening an obligation under UNCLOS to allow other States to take up its surplus,¹⁵⁸² would seem too convoluted. The US, of course, has not in any case ratified UNCLOS.

8.4.2 *Effects beyond borders*

It certainly appears that the US’s laws had an important effect on international law. Birnie writes that ‘[a]n amendment to s 204(b)(6) of the FCMA was proposed by Senator Packwood, and passed the Senate in July 1979’; and that ‘the threat of certification under this amendment caused Korea to withdraw its objection to an IWC decision in 1980 to ban the use of the cold harpoon for taking all whales except the minke’. The threat, Birnie says, ‘was also used

contrast to the Pelly Amendment which gives the President discretion as to whether he actually embargoes fish imports, there is no discretion under the Packwood-Magnuson Amendment. Sanctions *must* be imposed’. *Ibid* at 34-5.

¹⁵⁷⁹ *Ibid* at 35.

¹⁵⁸⁰ R L Friedheim ‘Negotiating in the IWC Environment’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 208.

¹⁵⁸¹ UNCLOS does, it seems, provide that ‘[c]oastal States are obliged to give access to others, particularly neighbouring States and land-locked countries, to the surplus of the allowable catch’; however, ‘[s]uch access must be done in accordance with the conservation measures established in the laws and regulations of the coastal State’. See ‘UNCLOS: A historical perspective: Exclusive Economic Zone’

http://www.un.org/Depts/los/convention_agreements/convention_historical_perspective.htm#Exclusive%20Economic%20Zone (accessed 30 May 2008). See Annex D.2.

¹⁵⁸² In terms of Article 62(2) of UNCLOS, a coastal State ‘shall determine its capacity to harvest the living resources of the exclusive economic zone’; and, where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements ... give other States access to the surplus of the allowable catch, ...’. See Annex D.2.

against other objecting states (Iceland, Norway and Japan)'.¹⁵⁸³ However, it was the *threat* that was used - not the real teeth of the Act.

The US's two laws are relevant beyond the ICRW/IWC. According to Reeve, '[w]hen Japan, a powerful wildlife consumer, joined CITES in 1980, it entered nine reservations, more than any other signatory at the time of becoming a party. The number reached 14 at one time, but has since reduced'.¹⁵⁸⁴ In March 1991, she records, 'the US Departments of Commerce and the Interior certified Japan under the Pelly Amendment for trade that threatened the survival of sea turtles and diminished the effectiveness of CITES'. In the result, after the certification, while President Bush was apparently deciding or not whether to impose trade sanctions, Japan entered into formal negotiations with the US on the issue; and, in the end, no sanctions were imposed'.¹⁵⁸⁵ So the Pelly Amendment has been used in a context other than whaling, the United States' political manoeuvres having global reach.

Per Reeve, '[n]on-compliance measures vary depending on the nature of the regime. They may be punitive - 'sticks' - or involve incentives - 'carrots'. *Sticks* 'usually take the form of trade or financial sanctions', and in the case of MEAs 'tend to evolve subsequent to treaty adoption in the light of practical experience and the political dynamics of each regime'.¹⁵⁸⁶ *Carrots*, according to Reeve, have been described as 'payoffs to other countries to cooperate'. They take, she says, the form of access to natural resources (for example, fisheries quotas, or access to genetic resources used in the CBD); access to markets (for example, by the CITES permit system); access to technology; and access to funding, either bilateral or multilateral'.¹⁵⁸⁷ This shows, perhaps, something of the nature of politics. The 'sticks' are not in the original treaty so as not to scare off potential parties; they are brought in later, perhaps even under cover, when it becomes apparent that they are needed.

8.4.3 *Paper tiger?*

In 2000, when Japan had begun taking additional species of whales under scientific permit, per Donoghue, '[b]ecause both sperm and Bryde's whales are protected under the provisions of the U.S. Endangered Species Act, US Secretary of Commerce, Norman Mineta, certified to President Clinton that [certain of] Japan's actions were contrary to US law'.¹⁵⁸⁸ Japan was 'therefore prohibited from access to pelagic fish resources within the US [EEZ]. In his statement of September 13, 2000, President Clinton stated: "[f]ollowing Secretary Mineta's certification that Japan is undermining whaling protections with its expanded whaling program, I am today directing that Japan be denied future access to fishing rights in U.S. waters, and directing members of my Cabinet to consider additional steps we might take, including possible trade sanctions"...'.¹⁵⁸⁹ Little, however, seems to have turned on this -

¹⁵⁸³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 543.

¹⁵⁸⁴ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 100.

¹⁵⁸⁵ *Ibid* at 102-103.

¹⁵⁸⁶ *Ibid* at 20-21.

¹⁵⁸⁷ *Ibid* at 20-21. [Reeve is here referring to P H Sand 'International Economic Instruments for Sustainable Development: Sticks, Carrots and Games' *Indian Journal of International Law* (1996).]

¹⁵⁸⁸ M Donoghue 'Whales - The New Scapegoat for Overfishing' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 383 at 388-89, fn 18.

¹⁵⁸⁹ *Ibid* at 388-89.

certainly, Japan does not appear to have backed away from its planned takes of these species.¹⁵⁹⁰

In December 2002, writing in *ISANA*, Masayuki Komatsu referred to IWC 54 and pointed out, under the heading ‘No resolution calling for restraint of Japan’s research was adopted - US loses strong ground for certification under the Pelly Amendment’, that ‘[f]or the first time since Japan started its research whaling program in 1987, no resolution calling for the reconsideration or refrainment of Japan’s research programs was adopted - which was in clear contrast to the annual adoption of such resolutions until the last meeting’.¹⁵⁹¹ The major reason, Komatsu explains, ‘for non-adoption this time was because the meeting was often thrown into confusion due to prolonged debate on the issue of the extension of the aboriginal subsistence whaling quota’. It has even been suggested to the present writer¹⁵⁹² that it was largely due to Komatsu himself, as Japan’s chief negotiator at IWC 54, that the ASW quota so dominated the debate - and that in the event this was not in fact a popular decision with Japan itself, being regarded instead as having been something of an error of judgment.¹⁵⁹³ Whatever the reason, wrote Komatsu in December, however, ‘it is to the advantage that a resolution urging to refrain from its research programs, which had passed continuously in the past, was not adopted’. He explains that ‘[a]lthough, seen superficially, no substantial progress was observed at this annual meeting, with resumption of whaling postponed, it is certain that our position is steadily taking root in the Commission’s debate’.¹⁵⁹⁴

This is the meeting - and the prolonged debate - in which the United States and Russia failed to have their ASW bowhead quotas renewed; although they did manage to receive renewals in October 2002.¹⁵⁹⁵ Komatsu’s argument for progress is that Japan is benefiting from being patient and seeking to change the IWC over time.

It may be that as the World Trade Organisation¹⁵⁹⁶ has become more powerful, so the threat posed by the US’s two domestic laws has been reduced. In September 2003, with Iceland proposing to carry out research whaling in its territorial waters, the Japan Whaling Association suggested that ‘[a]nti-whaling groups in the US are reportedly trying to press the US Government to invoke its domestic Pelly Amendment to ban fish imports from Iceland in retaliation against the Iceland’s research whaling. However, some observers believe that imposition of such a sanction is not likely because it would infringe upon the rules of the World Trade Organisation’.¹⁵⁹⁷

¹⁵⁹⁰ J Randerson ‘University taking cash from whaling criticised’ *The Guardian* 3 March 2008; <http://education.guardian.co.uk/print/0,,332776417-108229,00.html> (accessed 3 March 2008). It has been reported that in 2005/6, for instance, Japan caught 1 078 minke whales, 100 sei whales, 50 Bryde’s whales, ten fin whales and five sperm whales. *Ibid.*

¹⁵⁹¹ M Komatsu ‘What Was Achieved at the Shimonoseki IWC Meeting’ *ISANA* No. 26, December 2002 www.whaling.jp/english/isana/no26_01.html.

¹⁵⁹² Off the record, however.

¹⁵⁹³ See 10; esp. 10.2.3. See also (n 1755).

¹⁵⁹⁴ M Komatsu ‘What Was Achieved at the Shimonoseki IWC Meeting’ *ISANA* No. 26, December 2002 www.whaling.jp/english/isana/no26_01.html.

¹⁵⁹⁵ See 3.3.10, 10.2 and 10.3.

¹⁵⁹⁶ See Annex D.8.

¹⁵⁹⁷ ‘Japan Supports Iceland’s Research Whaling’ *JWA News* No.7, September 2003 http://www.whaling.jp/english/news/0309_03.html.

Iino and Goodman write that '[o]n three different occasions, Japan's whale research programs have resulted in "certification" by the United States under its domestic law known as the Pelly Amendment to the Fishermen's Protective Act. The first occasion was in 1987 when Japan began its Antarctic research program, the second was in 1995 when the number of whales to be taken under JARPA was increased and the third was in 2000 when the North Pacific research program was expanded to include Bryde's and sperm whales'. All of these 'certifications' were, they say, 'followed by threats of trade sanctions as provided for under the Act'. They then contend, however, that '[t]he imposition of such sanctions could be challenged under international trade rules of the [WTO], which prescribe that sanctions can only be imposed if they [] certain requirements and that they may not be implemented in a manner that constitutes arbitrary or unjustifiable discrimination'.¹⁵⁹⁸

Friedheim writes, however, that '[w]hether any new attempt to find a negotiated solution could succeed depends heavily on the attitude of the United States. Its initial response was not promising. It was one of the most vehement opponents of Canny's probe'.¹⁵⁹⁹ The US, says Friedheim, remains as the 'guarantor' of the IWC and acts as its 'policeman' under the Pelly amendment, claiming the US can enact unilateral trade sanctions against states that, in its opinion, 'diminish ... the effectiveness of an international fisheries conservation program'. However, he warns, 'when the [US] has used its big stick in the tuna-dolphin imbroglio, it was twice declared in violation of world trade laws'. On whaling, the Pelly Amendment, he says, 'has been used only to warn, to put diplomatic pressure on, not to impose severe economic sanctions' and suggests that it has diminished effectiveness only 'in frightening states from taking unilateral or regional action'.¹⁶⁰⁰

Again, however, the United States is acting within its own territory only. So this criticism of Friedheim's remains potentially disingenuous criticism; although probably a non-problem, given firstly the United States' historical disinclination to follow through with its threats to use the two domestic Acts - and, secondly, their possibly diminished importance in international law and global *realpolitik*.

When considering what it is that keeps Japan in the IWC, it is important to consider why Japan did not object - as Norway did - to the 1982 zero quota. The most likely explanation seems to be that Japan did so because of the threat of being barred from fishing in US waters. The US has national legislation which entitles - arguably even requires, in certain circumstances - the country to impose this sanction; or to refuse to allow imports from a country on which it has imposed this sanction.. On several occasions the US has used, or threatened to use, such sanctions - leading to accusations that the country abuses its economic and political might - but the reality is that when it has come 'to the crunch', on whaling, the US has usually backed away from exercising its full powers under the legislation.

¹⁵⁹⁸ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 21.

¹⁵⁹⁹ This is a reference to the so-called 'Irish Proposal' [in 1995]; in which Commissioner Canny sought to break the impasse by suggesting essentially that whaling might be permissible if conducted only within states' EEZs. See (n 239), (n 442), (n 1491) and (n 2287).

¹⁶⁰⁰ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 37.

9 Conservation of elephants

9.1 Zimbabwe's 'CAMPFIRE' programme

9.1.1 *The ideal conservation programme*

As an example, perhaps, of conventional thinking toward Zimbabwe's CAMPFIRE programme, Glazewski explains that the principle of local level governance requires that decision-makers should be obliged to live by their decisions, reflecting the adage 'think globally, act locally'. In the African context particularly, he says, there 'is much to be gained from the trend to community-based natural resource management, particularly in impoverished rural areas'; and the Communal Areas Management Plan for Natural Resources (CAMPFIRE) project in Zimbabwe 'is a flagship example' of the way that the traditional 'command and control' approaches to resource management can be replaced with local responsibility and participation'.¹⁶⁰¹ This is an uncritical description of what the project, in its ideal conception, is supposed to do.

Further noncritical comment comes from Komatsu and Misaki, commentators on whaling; who write that '[t]here is [a] country in Africa that has adopted a conservation policy that stands in stark contrast with that of Kenya. That country is Zimbabwe. ... CAMPFIRE ... offers a guide to the future of sensible conservation within a balanced framework of national development. ... This is conservation from a rational perspective, and with a view to the overall good of a society. It is intelligent conservation'.¹⁶⁰² This is not an altogether unexpected view, given Japanese support for sustainable use of natural resources in Southern Africa. The elephant can be used as a symbol for the resumption of whaling, and for sustainable use generally.

9.1.2 *Weaknesses in the programme*

The Douglas-Hamiltons write that in 1981 Zimbabwean conservationists were idealistic about sharing the benefits of elephant use with local people. It was 'curious', they say, 'that these ideas and their practice had originated in a bastion of white supremacy, where they flourished in a more advanced form at that time than in any other part of the continent'.¹⁶⁰³ In 1985, they then explain, they 'respected Zimbabwe's wildlife management, but while selling ivory might be a good thing for Zimbabwe elephants, it was a bad thing for the elephants in the rest of Africa' as other African countries generally did not have the machinery to regulate a trade which was quite out of control. 'What the Zimbabweans did not want to understand', they say, 'was that their system was not immediately exportable to the rest of Africa'. Perhaps with some prescience, they then add that '[n]or had it stood the test of time in Zimbabwe itself'.¹⁶⁰⁴

In practice, these words have proved well chosen; the CAMPFIRE programme has not stood the test of time in Zimbabwe. This might not be the fault of the programme itself, however; as the country has struggled with enormous political and economic problems in the 21st Century.

¹⁶⁰¹ J Glazewski *Environmental Law in South Africa* (2nd ed, 2005) at 19.

¹⁶⁰² M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 152.

¹⁶⁰³ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 216.

¹⁶⁰⁴ *Ibid* at 296.

Whether the programme is a victim of circumstances; or had inherent weaknesses from the beginning that ultimately brought it down; or was made unworkable by a combination of the two; is too difficult a question to tackle in this thesis. What is important, though, is to consider the programme's advantages and disadvantages in order to learn for the future; and thus be better prepared to bring its lofty objectives to life, if possible. The experience of CAMPFIRE holds important lessons for conservation efforts.

9.1.3 *The recent collapse*

At CITES COP 10 in Harare in 1997, President Mugabe praised CAMPFIRE; suggesting that '[o]ur people, through their representative and democratically elected councils are now able to participate in wildlife management' and that '[t]hey now understand the value which they derive from better environmental management principles since they associate wildlife and other natural resources with their own socio-economic development'.¹⁶⁰⁵

In recent times, however, CAMPFIRE appears to have simply collapsed. At least, virtually nothing is heard of it through the media. Zimbabwe, of course, has itself virtually imploded. In the face of political turmoil, famine, the world's highest rate of inflation, and other such ills; it is no wonder that an efficiently run wildlife management programme has received little attention - has been, in effect, an inevitable casualty. It is also, possible, however, that the programme was already showing signs of disintegrating by itself.

In May 2005 it was reported that '[t]he destruction of Zimbabwe's wildlife has become 'so alarming' to the International Rangers Federation (IRF) that it has decided to mount a global campaign to try to stop it'.¹⁶⁰⁶ In March 2006 it was reported that an annual state auction for hunting trophies had just been held in Zimbabwe.¹⁶⁰⁷ Particularly, in March, it was reported that '[f]oreign big game hunters had bid \$1.5 million (R9 million) to shoot leopards, lions, elephants and buffalos in Zimbabwe this year'.¹⁶⁰⁸ The authority was quoted as saying that 'despite the collapse of regular tourism amid political and economic turmoil ..., international interest in hunting remained high'. A similar auction was held in March 2008.¹⁶⁰⁹

¹⁶⁰⁵ CITES COP 10 'Opening Speeches: Address by the President of the Republic of Zimbabwe, Cde R G Mugabe' http://www.cites.org/eng/cop/10/E10_open.pdf.

¹⁶⁰⁶ L Marshall 'Rangers bare teeth to save Zim wildlife' *Sunday Tribune* 8 May 2005 at 11.

¹⁶⁰⁷ 'Zim auctions hunting licences for elephants, lions' *Mail & Guardian online* http://www.mg.co.za/printPage.aspx?area=/breaking_news_africa/ (accessed 6 March 2006).

¹⁶⁰⁸ Sapa-AP 'Zimbabwe bags big money for hunting' *The Mercury* 6 March 2006 at 4.

¹⁶⁰⁹ 'Zimbabwe Annual Animal Auction Takes US\$900,000' 13 March 2008 *Auction Info* <http://www.auctioninfo.org/2008/03/13/zimbabwe-annual-animal-auction-takes-us900000/> (accessed 2 June 2008). Interestingly, the same website reported that in August 2007 an auction of more than two tonnes of ivory had been abandoned in Zimbabwe after potential buyers decided that the reserve price asked was unreasonable - having allegedly risen from US\$225 000 per kg in May to US\$1-million in June. The auction was apparently open to invited licenced ivory manufacturers - the report is not specific on who these persons were. 'Zimbabwe Ivory Auction Abandoned Over Price Deadlock' 9 August 2007 *Auction Info* http://www.auctioninfo.org/2007/08/09/zimbabwe_ivory-auction-abandoned-over-price-deadlock/ (accessed 2 June 2008). According to a lengthier report, it seems that the auction was being held in response to the 'lifting of restrictions' by CITES COP 14 - but the identities of the buyers are still not given. 'Zimbabwe: Ivory Auction Abandoned Over Deadlock' *The Herald* 8 August 2007 Republished by *Sanwild* 'Notice Board' 9 August 2007 <http://www.sanwild.org/NOTICEBOARD/JuneDec/Zimbabwe%20Ivory%20Auction%20Abandoned%20Over%20Price%20Deadlock.HTM> (accessed 2 June 2008). Presumably the invited buyers were from Japan, the only country which currently has approval from CITES to purchase ivory. The buyers could also have been Zimbabwean residents, of course; but this seems unlikely.

There are disparate views of the situation within Zimbabwe, though, with ‘conservationists’ saying that ‘illegal hunting by corrupt officials, military officers and their foreign guests increased in many rural areas after the chaotic, often violent, seizures of thousands of white-owned commercial farms that began in 2000’ and that poaching of animals for meat has also risen. It has even been suggested that an official drive named ‘Operation Nyama’ (meaning ‘meat’) has been used to gain political support from local communities, as well as to provide a cover for corruption and ivory smuggling - with both operating to the detriment of wildlife.¹⁶¹⁰

Zimbabwe insists officially, however, that ‘its bush habitat is overpopulated by elephants that cause environmental damage and destroy crops’; with elephants, in recorded cases in 2005, killing 12 people in Zimbabwe, mostly by charging and trampling villagers trying to protect their crops’.¹⁶¹¹

On the whole, it seems that the official view is incorrect and that wildlife protection generally has been a casualty of the desperate efforts by an obscene and illegal government to stay in power through brutal means. It has been widely reported in the media that tourism has virtually collapsed; but, ironically, hunting-related tourism may in fact be flourishing with particularly American and Spanish hunters taking advantage of the slide in controls to shoot elephants without going through the normal channels.¹⁶¹² The revenue raised from such operations is not, however, likely to benefit local people as had been the intention under CAMPFIRE.

9.1.4 *Modern programmes*

Sheldrick comments on opponents of the current Kenyan ‘preservationist’ view as ‘[t]rying to sell [the] success of CAMPFIRE to our government’.¹⁶¹³ CAMPFIRE has been lauded as a model, of course; but has it now been abandoned? Kenya does have a number of its own programmes running.¹⁶¹⁴

Pickover criticises the South African faith in its conservationist programmes; arguing that ‘[a]lthough South African conservationists extol their policies for managing protected areas and biodiversity, the available statistics paint a vary different picture’; with South Africa having ‘the highest estimated rate of extinctions for any area in the world, with 37 per cent of

¹⁶¹⁰ See, for instance, ‘Tourists flee park elephants slaughter’ *The Telegraph* 23 March 2005 http://www.zimbabwesituation.com/mar23a_2005.html#link2 (accessed 6 March 2006); B Unti ‘As Zimbabwe’s Woes Mount, Mugabe Declares Open Season on Wildlife’ *HSUS* 12 May 2005 http://www.hsus.org/about_us/humane_society_international_hsi/hsi-disaster-response/mugabe_declares_open_season_on_wildlife.html (accessed 30 May 2008).

¹⁶¹¹ Sapa-AP ‘Zimbabwe bags big money for hunting’ *The Mercury* 6 March 2006 at 4.

¹⁶¹² S Shaw (pseudonym) ‘Mugabe presides over decline in Zimbabwe’s wildlife parks’ *The Guardian* 30 May 2008 <http://www.guardian.co.uk/environment/2008/may/30/conservation.wildlife> (accessed 30 May 2008). According to a recent media report, in a November 2007 helicopter survey of the (relatively minor) Chizarira National Park in Northern Zimbabwe, which Park is supposed to be a non-hunting reserve, some 9 000 elephant carcasses were counted. According to the same report, the (non-governmental) Zimbabwe Conservation Task Force conducted a game count in 2007 and apparently estimated that more than 90% of wildlife on private game ranches, and between 35% and 100% of wildlife in conservancies, had been killed since 2001. E Momberg ‘Hunted ellies rot in parks’ *Sunday Tribune* 6 April 2008 at 10.

¹⁶¹³ *Personal Communication*: Daphne Sheldrick, interviewed by E Couzens, Nairobi, 2 October 2004.

¹⁶¹⁴ Such as, for example, the Kitengela programme, on lands adjoining the Nairobi National Park, Kenya. This is a ‘lease programme’ where landowners are paid (comparatively small) amounts of money for leasing their land for wildlife. *Personal communication* 6 October 2004: Couzens; Kitengela Community, Nairobi National Park. Benson ole Mutunkei, The Wildlife Foundation.

its mammal species threatened'. Pickover's assessment is that South Africa's current policy of 'resource use' has the effect of 'reducing biodiversity significantly and increasing the number of threatened species, because it alters the way ecosystems function'.¹⁶¹⁵ In the view of the South African government, she says, 'indigenous South African communities have a tradition of using wild life sustainably and therefore, to right the wrongs of the past, communities now living adjacent to parks' should be given increased access to the parks' 'resources' so that these can continue to be used sustainably. However, she comments, the 'sustainable use' of resources as practised by past indigenous societies 'cannot be transposed onto poverty-stricken rural communities and societies living near protected areas today, because the entire social and economic structure of society has changed'; and it 'is naïve to believe that these communities can operate independently of markets and the homogenised model of development in which they find themselves'.¹⁶¹⁶

Potentially, this criticism of naïvete is relevant for the issue of traditional whaling too. Pickover continues, arguing that giving access to 'wildlife resources' by rural communities is 'a short-term, quick but largely unsustainable fix to generate income for those communities. It leads to uncontrolled pillaging and long-term livelihood crises'.¹⁶¹⁷ This view rather flies in the face of the significance given to indigenous peoples' rights in international law; but finds support in Leakey's view that 'Kenya is no longer in the nineteenth century' and that '[w]hen there are only [600] people near a wildlife area it may be possible to live in harmony with the animals, but not when there are [600 000]'.¹⁶¹⁸

Hasler writes that '[t]he recent political changes in South Africa have highlighted both the environmental concerns about sustainable use of resources and the political concerns about equitable use of resources by historically disadvantaged groups'. The two issues, he says, are not exactly the same, and projects need critically to evaluate whether they might not be 'fusing' the two. Ecotourism, he comments, is 'presented as a panacea which seems to solve the problem by providing the engine for rural reconstruction'. 'Community based' approaches to South Africa's environmental and equity problems tend to proceed, in his judgment, 'as if the historical, economic and political processes which removed people from land, marginalized education and reduced rights of access to resources had never existed, ie as if disadvantaged communities were indeed magically empowered'; whereas experience with CAMPFIRE has made it clear that 'communities' do not exist in political and economic vacuums.¹⁶¹⁹ Experience with CAMPFIRE, he concludes, indicates further that 'naïve definitions of local communities as homogenous, self contained, and as existing outside of the existing political and economic currents which largely determine the success of projects can seriously flaw such initiatives from the start'.¹⁶²⁰

These observations are not unique to South Africa and Zimbabwe, but provide lessons for other conservation schemes worldwide.

¹⁶¹⁵ M Pickover *Animal Rights in South Africa* (2005) at 101-103.

¹⁶¹⁶ *Ibid* at 101-103.

¹⁶¹⁷ *Ibid* at 107.

¹⁶¹⁸ R Leakey & V Morell *Wildlife Wars: My Battle to Save Kenya's Elephants* (2001) at 133.

¹⁶¹⁹ R Hasler 'Ecotourism: A Comparative Analysis of Findings from Kenya, Zimbabwe and South Africa' (CASS Occasional Paper Series - NRM) (1996) at 28.

¹⁶²⁰ *Ibid* at 32.

9.1.5 Further problems

In more modern times, Lapointe has written of the Kenyan safari business that ‘Kenya is often presented as the African paradise’; a view that has been ‘promoted by the Kenyan Government, as well as orchestrated by numerous NGOs based in Nairobi who advocate the non-use of nature’. However, he comments cynically, ‘[w]hat [tourists] really see is a *Disneyesque* animal park drive through, where real people are just bit players in costumes’. He then laments the difference between ‘Kenyan eco-tourist areas and the magnificent regions of Africa where wilderness has not been raped by eco-tourism and where the relationship between people and animals is preserved’.¹⁶²¹

‘In the Zimbabwean political economy’, argues Hasler, the ‘community’ can be thought of ‘as an onion, with layer after layer of community identity peeling away to reveal further community identity’. For example, he explains, the political order ‘can be seen in terms of levels: international, national, provincial, district, ward, village, households’; and this ‘segmentary definition of community is possible because so many issues impinging on local outcomes are defined at higher levels’. To illustrate this point, he explains that CITES debates ‘largely determine whether elephants will be traded directly influencing revenue to local people’; while ‘[n]ational politics and policy influence who has access to resources’ and ‘district interests may see these resources as belonging to them, while ward, village and household may regard the same resources as falling under their jurisdiction’. Ultimately, a compromise between ‘these different levels of access rights and a mixture of interests including the state, local communities and the private sector is what has become known as co-management’.¹⁶²²

It is important to bear these linkages in mind. The decisions taken at CITES COPs - and IWC Meetings - are not abstract resolutions far removed from individuals - ‘range people’ - ; but are of direct and vital relevance to such people.¹⁶²³

¹⁶²¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 155-156.

¹⁶²² R Hasler ‘Ecotourism: A Comparative Analysis of Findings from Kenya, Zimbabwe and South Africa’ (CASS Occasional Paper Series - NRM) (1996) at 32, fn 14.

¹⁶²³ The present writer saw an example of this when attending - as part of the 9th Biennial International Association for the Study of Common Property (IASCP) Conference, Victoria Falls, 17-21 June 2002 - a field trip to the Chobe Enclave Trust in Botswana. The field trip was attended by local community members and by Botswana government (conservation service) representatives. The community explained how they had managed to use money from the sale of elephants to trophy hunters to better their lives - building a mill and a hardware store, for instance; but complaining that they could do so much more if they were allowed to sell more elephants. The conservation officials explained that they would like to allow the community to sell more elephants to hunters, but that they could not do this ‘because of CITES’. The community expressed great bitterness toward CITES - seeing it as an interfering body that prevented them from offering for sale more than a small number (12, at the time) of elephants per year, despite CITES requiring only an export permit. This showed, in my view, that the international Convention has not been successful in persuading indigenous communities of its worth. In other words, the irony is that while it is possible that the CITES restrictions from 1989 onward have kept elephant numbers from plummeting dangerously low, land users ‘on the ground’ now blame CITES for keeping them poverty-stricken and unable to utilise ‘their’ land as they would like. See E Couzens ‘Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries’ in N J Chalifour, P Kameri-Mbote, L Heng Lye & J R Nolan (eds) *Land Use Law for Sustainable Development* (2007) 27 at 33. See (n 1148) and (n 2220).

9.3 CAMPFIRE resurrected - the Peace Park

9.3.1 *The transboundary park*

In recent years, a new idea has come into circulation - the transboundary park, transfrontier park, or 'Peace Park'. The idea is that a park will straddle international borders, where these borders arbitrarily divide areas of land that would otherwise be linked as natural ecosystems. Tourists will be able to cross between countries in exploring the park; and wildlife will likewise be able to move across 'borders.' Several examples have come into existence. The concept is an extremely attractive one from an ecological point of view, particularly when one considers that space might be provided for expanding elephant populations. However, there are problems and potential problems.

The idea is of a 'conceptual shift away from the idea of strictly protected national parks towards greater emphasis on multiple resource use by local communities'. The 'transfrontier conservation area' (TCA) was given the definition of 'a relatively large area' straddling 'frontiers between two or more countries and cover[ing] large-scale natural systems encompassing one or more protected areas'. Promoted by WWF South Africa, on the basis that an independent body was needed to co-ordinate, facilitate and drive the establishment of TCA's, the Peace Parks Foundation was established on 1 February 1997 - on a grant of R1.2 million (\$260 000.00) from the Rupert Nature Foundation.¹⁶²⁴

In respect of Malawi and Zambia, it has been suggested that Malawian and Zambian officials have discussed 'a transfrontier venture to guard protected areas along their common border - namely the Kasungu, Zambia Nyika and Malawi Nyika national parks'; an initiative funded by the South Africa-based Peace Parks Foundation, of which former President Nelson Mandela is a patron. Malawi is apparently presently 'trying to build a strong tourism industry with wildlife as its major attraction, to boost foreign exchange earnings'.¹⁶²⁵

In respect of Zimbabwe, it has been reported that it is evident that 'the country's instability is putting a damper on imaginative plans to create a parks network spanning national boundaries in Southern Africa that would spell wonders for conservation and create an ecotourism industry that would play a major part in the transformation of the region'. The Greater Limpopo Transfrontier Park, which will combine Kruger National Park with Zimbabwe's Gonarezhou and Mozambique's adjoining Limpopo Parks, will form a 35 000 square kilometre reserve in which animals will eventually be able to cross national boundaries freely. South African officials 'involved in the dealings' have been reported as talking of their Zimbabwean counterparts showing 'great enthusiasm' for the plan. Apparently the area of community-owned land that will be needed on the Zimbabwean side of the Limpopo River border 'to create a corridor linking Gonarezhou to the two southern parks' has already been demarcated.¹⁶²⁶

¹⁶²⁴ See 'Peace Parks Foundation' at <http://www.peaceparks.org>; specifically http://www.peaceparks.org/story.php?mid=9&pid=6&m=3_1_2.

¹⁶²⁵ C Mkoka 'Wildlife officials brace for 2004 ivory sale' *Earthyear Mail & Guardian online* http://www.mg.co.za/articledirect.aspx?area=mg_flat&articleid=33244.

¹⁶²⁶ L Marshall 'Rangers bare teeth to save Zim wildlife' *Sunday Tribune* 8 May 2005 at 11.

All of the Southern African countries appear to be involved in transboundary park projects - clearly, countries desperate to boost their tourism incomes are keen on the idea of the Peace Park. It has, perhaps, even become the 'CAMPFIRE' of the 21st Century.

9.3.2 Dangers

There are dangers, however. According to Harry Wels, there is a paradox in the managerial attempt by the SA Peace Parks Foundation in its focus on community development. Wels argues that cohesion is found mostly at the managerial level. He argues that the media has 'bought' the idea that transboundary peace parks (tbpp's) due to a sophisticated marketing effort, pushing the view that tbpp's will be sustainable if they promote consumptive and non-consumptive use, while fostering biodiversity. He argues that 'opening up' seems to suggest that we are striving toward the goal of peace; while, paradoxically, communities are not being allowed the same sense of freedom of movement.¹⁶²⁷

There is a danger that the Peace Park will be an imposition on local people - and perhaps even come to represent another intrusion into national sovereignty by Western States. Such intrusions might be beneficial; on the other hand, it is possible that projects which have their roots in intrusion will always have shaky foundations. It is to be doubted whether such intrusions are ever entirely altruistic; it might be, for instance, that the originators of the projects have the 'welfare' (including reservation as hunting targets!) of wildlife more at heart than the welfare of people.

Other notes of caution have recently been sounded. According to Bryden, '[t]he Trans-Frontier Conservation Area is a wonderful idea, but we should not harbour any illusions about the fact that it will bring some problems in its wake alongside all the good things it will achieve'.¹⁶²⁸ Per Bryden, further, '[i]t is a fact that the removal of the man-made barriers that prevent natural game migration in search of water and veld food will do a great deal towards restoring a healthy natural balance'; and, he says, '[i]n many parts of the world it is no longer possible to restore the game highways, but here it is feasible and achievable'.¹⁶²⁹ He explains, however, that the success of the project will 'depend on the way it is carried out'. Establishing a game park of any kind, he tells us from an informed perspective as a long-time conservationist in the Kruger National Park, 'is a time-consuming and complex process, and those who undertake such a project need to bear in mind the popular South African saying that there are some things you simply can't press into ripeness'. He concludes by saying that he has 'an uneasy feeling that the process might be going too fast'.¹⁶³⁰

The CAMPFIRE programme has been influential worldwide. For instance, Sri Lanka (where 'elephant-human conflict resulted in the deaths of more than 100 elephants and 60 people per year during the 1990s') is apparently implementing a 'community-based project that seeks to fence villagers and their crops in and keep the elephants out'.¹⁶³¹ 'The model', according to the

¹⁶²⁷ According to Dr Wels, of the Vrije Universiteit, Amsterdam, it is '[u]nclear what is meant by communities accepting benefits ... some community levels might like to link up with elites'; and it is '[t]oo early to start predicting whether TFCAs are going to work or not'. H Wels 'The lie of benefit in CBNRM' *Conservation and Environmental Management (CEM) Seminar* 17 February 2005, University of KwaZulu-Natal, Pietermaritzburg.

¹⁶²⁸ B Bryden *A Game Ranger Remembers* (2005) at 22-3.

¹⁶²⁹ *Ibid* at 367-8.

¹⁶³⁰ *Ibid* at 367-8.

¹⁶³¹ US Fish & Wildlife Service 'Asian Elephant Conservation Act: *Summary Report 1999-2001*' at 11.

US Fish and Wildlife Service, ‘was originally pioneered in Zimbabwe by [CAMPFIRE], when it was realised that carving up vast landscapes with linear fences was contrary to the goals of crop protection and wildlife management’.¹⁶³²

It occurs to the present writer that the embracing of and enthusiasm for the Peace Park idea, by other countries, mirrors the enthusiasm once shown for CAMPFIRE. In that sense, Southern Africa is extremely important as a region which is serving as a testing ground for the ‘rest’ of the world ... however, the ‘rest’ of the world may make the mistake of taking over wholesale models that are flawed, or which are not sufficiently adapted to local needs.¹⁶³³ Hopefully, though, the promising early signs from the TFCA concept will bear fruit. Even if the concept does not ever work as well as hoped, increased international cooperation in the conservation of wildlife is unlikely ever to be altogether a bad thing.

9.3 The East and the Southern African viewpoints

It is important to understand that one of the most important reasons why elephants and whales are such important icons of conservation, and why the battles over them are fought so bitterly, is because it is possible to argue coherently that neither species is truly endangered. This is why there is a debate - were the species on the point of extinction, there would not be a debate over whether to use them consumptively or not. It is important to remember that there are species which are indisputably endangered - and these species might well be affected by decisions made on the conservation of elephants and whales.

9.3.1 *Trade in one place affects others*

According to Sheldrick, ‘[a]ny trade in ivory threatens all [elephants]’ as it is ‘no good thinking of them in pockets. Elephants can walk 100 km in a day. So what happens at one end of Africa impacts on the other’. She explains that there is ‘an upsurge in poaching every time there is a CITES meeting’.¹⁶³⁴ She deals also with the argument that the money raised from a legal trade in ivory can be ploughed back into conservation; suggesting that ‘[as for p]utting money into conservation; history shows [that it is] coming back into pockets’.¹⁶³⁵ This is arguably the reality behind the argument that conservation *needs* trade.

Despite its various problems, Kenya, Sheldrick suggests, has much to be proud of. ‘Kenya’, in her view, ‘is having a hard time in the world, defending its stance’. Questioned on Tanzania’s apparent switching of stances,¹⁶³⁶ she said cynically that ‘money talks’; but that ‘Kenya has always been known for its compassionate stance. ... Kenya’s always been proud of. Great market value to Kenya as being one of few countries. Tourism is Kenya’s main revenue earner’.¹⁶³⁷

¹⁶³² *Ibid* at 11.

¹⁶³³ According to the Peace Parks Foundation, the Foundation has been requested to give advice in regard to potential parks between Japan and Russia; Albania, Greece and Macedonia; Argentina and Chile; China, Mongolia and Russia; and even one in the demilitarised zone between North and South Korea. ‘The Future’ *Peace Parks Foundation* <http://www.peaceparks.org/faq.php?pid=82&mid=302> (accessed 2 June 2008).

¹⁶³⁴ *Personal Communication* Interview with Daphne Sheldrick, Nairobi, 2 October 2004: E Couzens.

¹⁶³⁵ *Ibid*.

¹⁶³⁶ See 5.3.12, 5.3.20, (n 1171), (n 1196) and (n 1655).

¹⁶³⁷ *Personal Communication* Interview with Daphne Sheldrick, Nairobi, 2 October 2004: E Couzens. Sheldrick did, however, tell the present writer that the ‘current KWS Director would sell anything’. *Ibid*. Sheldrick did not name the

Douglas-Hamilton explains that people in conservation circles in East Africa are convinced that ‘a resumption of the ivory trade in any form would lead to a resumption of the uncontrolled illegal trading of the past’. ‘While the ivory trade’, he says, ‘would not make elephants extinct’; he argues that ‘it could easily reduce them from thousands to a few hundreds, push some populations to extinction and others through a genetic bottleneck where the survivors would be largely tuskless’. ‘There is no cause’, he concludes, ‘for complacency about the effects of the ban, and continued vigilance and support for anti-poaching is vital’.¹⁶³⁸

Without trade, the stockpiles of ivory kept by governments will inevitably increase. However, this has to be weighed against the dangerous consequences of any trade setting a precedent. Douglas-Hamilton, worth quoting at length on this, writes that it is an open question of what should be done with ‘Africa’s existing stocks of ivory accruing from animals that die naturally, are shot on crop protection or recovered from poachers’. ‘A powerful argument has been made’, he admits, ‘to make money for conservation from limited ivory sales, and to use the proceeds to finance conservation schemes to benefit local people who share the land with elephants. In a country like South Africa, with well-run parks like Kruger, one can imagine such tightly controlled operations working’. ‘Unfortunately’, he goes on to argue however, ‘the argument, while compelling, is fatally flawed’; because ‘[a]ll past experience suggests that any legal trade will stimulate a vast, illegal, parallel trade both in Africa and at the consumption end in Asia. Secondly, it is questionable that the proceeds from ivory would benefit conservation or the local people, rather than disappearing into the pockets of power brokers’. ‘Finally’, he concludes, ‘any legal trade would undermine the present climate of disapproval associated with owning ivory, sending out a clear signal that ivory is respectable provided it comes from official sales’.¹⁶³⁹

9.3.2 *The Southern African position*

In South Africa particularly, it can be argued by the protagonists of ploughing the proceeds of trade back into conservation that government corruption will not see the proceeds diverted into the pockets of politicians and the wealthy elite - as must be a grave concern in present-day Zimbabwe.¹⁶⁴⁰

There is, however, another form of ‘corruption’ that has taken firm root in South Africa in recent years - the ‘corporatisation’ of parastatals. In the conservation field - as in universities, municipalities and parastatals generally - the move toward corporatisation, the creating of executive structures with ‘executive salaries’ and an ever-widening gap between this structure and the rank-and-file of staff - has become a feature. While these executives are appointed often on short (typically five year) contracts, without long-term job security, the temptation is

Director. It seems, though, that the KWS Director, Evans Mukolwe, was suspended in November 2004 on suspicion of corruption. See, for instance, ‘Kenya’s wildlife head suspended’ *BBC News* 9 November 2004 <http://news.bbc.co.uk/2/hi/africa/3995077.stm> (accessed 2 June 2008).

¹⁶³⁸ I Douglas-Hamilton ‘Foreword: An East African Perspective’ in D & S Balfour *African Elephants: A Celebration of Majesty* (1997) 18 at 20.

¹⁶³⁹ *Ibid* at 20. ‘The demand for ivory’, he contends, ‘may have been stemmed in the West, but it is still ‘very much alive’ in the East. Tinkering, he says, with limited sales would ‘lend legitimacy to the purchasing of ivory and might well wake up a sleeping giant of demand’. His ultimate assessment is that ‘[i]f money is needed for conservation, funds from ivory sales are a red herring. Ivory, even during the recent ivory rush, was never more than a fraction of one per cent of the GNP of any African country. The funds needed for conservation and protection of biodiversity are far greater than could ever be supplied by a limited ivory trade’. *Ibid*.

¹⁶⁴⁰ See 5.3.26 and (n 1243).

there (and is seemingly almost irresistible) to engage in what might be called ‘corporate looting’ - especially through the iniquitous medium of, often undisclosed, self-assessed and ludicrously high ‘performance bonuses’. To the minds of some - including the present writer - it makes little difference whether the ‘proceeds that are going back to conservation’ find their way unofficially (secretly) into the pockets of middlemen and corrupt officials; or whether they find their way into the grossly inflated official salaries of the executive management of the conservation hierarchies.¹⁶⁴¹ In total, according to the 2005/2006 annual report released by SANParks, SANParks’ total revenue from tourism, retail and concessioning increased to R486.05 million in 2006 from R441.18 million [the previous year], an increase of 10.2%. The salary package for the executive team of 12, including bonuses and incentives, was R13.499 million last year. ... 30% higher than in 2004/2005’.¹⁶⁴² The cynical observer might well argue that in such a culture of ‘corporate greed’ conservation considerations will be secondary to the finding of new ways to maximise profits; while it is understandable also that managers at lower levels, faced with budget constraints caused at least partially by the need to accommodate executive packages, will likewise argue for the increased use of resources such as ivory. In a world where the use of ivory has traditionally been politicised and where economic considerations are paramount, this is hardly surprising.

In mid-2007, just before the CITES COP, the present writer asked van Schalkwyk what role, given the opposition by West African countries in particular, as well as Kenya, to the ivory trade, he thought South Africa might be able to play in CITES in bringing African countries together. He answered that it is ‘a very important foreign policy priority for South Africa to get greater African unity, greater consultation in Africa on issues of importance’. He then explained that ‘on this issue, we’ve tried our level best to discuss it with our African counterparts ... but there is a difference here ... and the difference is, to put it quite bluntly, we have managed our wildlife in SA extremely well, some other parts of Africa did not ... and we cannot be punished because they didn’t manage their resources well’.¹⁶⁴³ So, van Schalkwyk said, ‘on this issue there are basically different views’; but he then added that ‘I must say some of the other African countries, governments, that I spoke to privately said “listen we understand what you want to achieve, we have a lot of respect for that, but we are under pressure from internationally financed NGOs to oppose you on this issue, which we also respect” ...’. He concluded with the concession that this would ‘be a difficult discussion at CITES’.¹⁶⁴⁴

The present writer then suggested to van Schalkwyk that one way South Africa might breach that divide would be to offer to support other African countries, and to share the country’s

¹⁶⁴¹ It was reported, for instance, in October 2006 that ‘[a] young communications official at South African National Parks earns almost as much as the president of this country - R1 million a year. Wanda Mkutshulwa is the spokesman for SANParks. Her package is a whopping R1.045 million a year and includes R214 000 in allowances, R275 000 in bonuses and a basic salary of R552 000. In fact, she earns nearly a quarter of a million rand more than Marthinus van Schalkwyk, the Minister of Environmental Affairs and Tourism, under which SANParks falls, who earns about R800 000’. H Bamford ‘Wildlife’s gravy train’ *The Independent* 21 October 2006 at 1. According to the same report, ‘Mkutshulwa is not the only one at SANParks who earns a seven-figure salary. The whole management team all earn seven-figure salaries. The head of South African National Parks, David Mabunda, earned R1.728 million last year, ...’. *Ibid* at 1. It turns out that Mkutshulwa is not even an experienced conservationist - rather she is ‘a former journalist who previously worked as head of communications for the Commission on Restitution of Land Rights in the Eastern Cape before joining Sanparks in 2003’.

Ibid at 1.

¹⁶⁴² *Ibid* at 1.

¹⁶⁴³ See (n 915), (n 1109), (n 1137) and (n 1211).

¹⁶⁴⁴ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens.

expertise with respect to enforcement and implementation, monitoring and traffic control; and asked again whether he thought that there be a role for SA there. van Schalkwyk agreed; and said:

we've actually started that process last year ... we created a forum ... a leadership for Africa where we invited other African countries ... not at political level but at the level of the management authorities ... This meeting took place in the Kruger. We invited the ten key countries from a wildlife management perspective in Africa ... and a very good meeting that we had ...and we also had some of the most prominent private companies involved in that meeting because we also need to generate private resources, money, to make sure that we can succeed there. There's still a lot that we have to thrash out, but we believe that we have a lot to offer African countries but we also believe they have a lot to offer us, and that forum will create the opportunity to do so.¹⁶⁴⁵

9.3.3 *East African economics*

It has been suggested that national parks are in trouble in East Africa; and that they are not bringing in the money that they could bring in, and were once expected to bring in. Komatsu and Misaki write that 'Kenya is a country rich in wildlife ... [i]nitially they [national parks and reserves] were regarded as a revolutionary approach to wildlife preservation, but despite their success over the years, today they are in serious decline as tourists stay away because of safety concerns. Consequently, the revenue they previously generated is now drying up'. With fewer tourists, they suggest, 'coming to the national parks and the resultant fall in income, the parks themselves are becoming dilapidated through lack of maintenance'.¹⁶⁴⁶ 'An additional problem', according to the same authors, 'is that many of the wild animals in the parks are overprotected to the extent that now there are simply too many of them, and they are becoming difficult to control. Elephants are a case in point, with protection programs having been too successful and Kenyan elephants now having to be transported to new habitats in West Africa, such as Sierra Leone and Cameroon'.¹⁶⁴⁷

Probably, these charges are not entirely correct and are not to be taken too seriously - while tourism remains a significant earner of foreign currency, it is true that it has lost some lustre in recent years. Further, if any elephants have been moved to the countries mentioned, it was in very small numbers and for reasons other than overpopulation.¹⁶⁴⁸ The comments are useful, however, for revealing something of Japanese awareness of linkages and symbolism.

Today, some writers criticise the 1989 burning of Kenya's ivory stockpile. Komatsu and Misaki, for instance, write that '[i]n the recent past, Kenya's then President Arap Moi went so far as to burn ivory stocks in a graphic demonstration to the world of his Government's policy on the conservation of elephants. Far from being a dramatic gesture for a principles stand, this was in fact an example of an irrational approach to the responsible utilization of wildlife. It might have made some people feel better, but it did little to open minds to the real issue'.¹⁶⁴⁹ The writers then pose the question of 'why the Kenyans do not want to responsibly utilize

¹⁶⁴⁵ *Ibid.* See (n 1099) and (n 1997).

¹⁶⁴⁶ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 150-151.

¹⁶⁴⁷ *Ibid* at 150-151.

¹⁶⁴⁸ The present writer has found no other references to the translocation of elephants from East to West Africa; and, given the publicity that has accrued to the translocation of elephants *within* Kenya, doubts that any such East-West translocation can have been on a significant scale.

¹⁶⁴⁹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 150-151.

their own wildlife resources. If elephants are increasing to such an extent that they are now a problem, why don't people make use of them and cull the population to a sustainable level? What is wrong with a cull of set numbers, dictated by responsible conservation standards, and the people of Kenya using the meat and ivory and processing the skin and other parts that have commercial value?'. To do so, they contend, 'would be sound in both conservation and economic terms, in the latter case through providing much-needed jobs and income for Kenyans'.¹⁶⁵⁰

The writers do not, however, make any effort to consider the Kenyan point of view - in other words, they have not even presented the Kenyans' arguments as to why they are not following this suggested, and apparently self-obvious, path.

'Unfortunately', Komatsu and Misaki continue, 'Kenya appears to have been brainwashed by a one-eyed protectionist policy that refuses to allow rational debate on the proper use of natural resources. Clearly, that is a contributing factor to out-of-control animal populations, and increasing human poverty in this part of the world'. Their assessment is that Kenya has 'fallen hostage to the protectionist doctrine that killing elephants, at any level, or in any way, shape or form, will lead to the decline in its tourist industry'. They then explain that the 'folly of this argument is clear as tourism declines regardless because of social issues that could to some extent be alleviated with more thinking and less protectionist emotion'.¹⁶⁵¹

This is much the same sort of rhetoric as is used in the whaling debate; and it creates a straw man of the Kenyan argument by oversimplifying it. This is a disservice to the East African, and Indian, viewpoint; a viewpoint which is also shared by many Western states and conservation groups.

9.3.4 The gulf between Eastern and Southern

Certainly, there appears to be an enormous gulf between the Southern African and Eastern African views. Pickover writes, of an interview with the CITES co-ordinator in the Kenya Wildlife Service, that the interview 'highlighted the stark policy differences between Southern African and other African countries'. She quotes her interviewee as saying that '[o]ne day we will realise that elephants cannot be reduced to the value of their teeth. Elephants are and always will be synonymous with the greatness of Africa'. Pickover then argues that '[w]e as a global community must accept a responsibility for the future of elephants'; and that '[p]erhaps economists and those involved in policy development' should re-examine the concept of 'value' - especially that 'of the intelligent species such as elephants, apes and whales'. Ivory, she says, 'is not essential to anyone, it does not provide a cure for any disease, nor does it satisfy starving people. For now, I do not doubt that the international ban on trade in ivory is essential and critical to the survival of elephants not only in Africa, but in Asia too'.¹⁶⁵²

¹⁶⁵⁰ *Ibid* at 151.

¹⁶⁵¹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 152.

¹⁶⁵² M Pickover *Animal Rights in South Africa* (2005) at 77.

9.3.5 *Western's views*

Interviewed, Western suggested to the present writer that Kenya's 1977/78 Wildlife Policy Act would not look different to that of South Africa - but it was suspended by a (temporary) hunting ban in the late 1970s; and remains suspended.¹⁶⁵³ In regard to CITES, Western suggested that Kenya's position has over time reflected the views of the different directors of its Wildlife Service; in particular, Leakey in 1989 and Western himself from 1994 to 1997. Western explained that Kenya recognised that certain countries do have more viable populations than others; that laundering is the biggest problem; and that the country therefore 'looked for a split-listing'. This, he said, came out at the CITES COP at Fort Lauderdale in 1994; where Kenya proposed a split-listing of white rhinos. In 1997 Kenya's main concern was to protect elephants as a whole, but it did recognise that if elephants were over-protected there was a danger of countries 'going outside' CITES' auspices. Apparently, a meeting was held at which an attempt was made to try to accommodate extreme positions. At this meeting, the Southern African countries apparently accepted linkage for the first time - acknowledging that poaching in the South can affect the North. It was agreed to continue negotiations; but the preliminary sessions indicated that the split was still big, although what had been a major breach before had now been bridged. At subsequent meetings, Western continued, Kenya has always been protecting its own elephants; with its position being that the weakness of the conditions for downlisting means that ivory should not be traded. Kenya, therefore, has really focused on the conditions not being met; 'not that there should be an uplisting'.¹⁶⁵⁴

Interestingly, he argues that there is a wide split within East Africa itself; suggesting that 'the rift between Kenya/Tanzania alone is huge'. Six years ago in Arusha, he argues, Tanzania agreed that there should be East African unity; but that 'we have drifted apart' with the drift being on 'collaborative natural resource management'. Devolution and liberalisation, he explains, is the Kenyan approach; while Tanzania concedes only very limited rights at village level, with communities not being able to choose not to have hunting and it being 'illegal to set up eco-lodges'. 'If we have such big divides', he asks, 'how can CITES work?'. The CBD, he argues, is not just about wildlife'.¹⁶⁵⁵

Western is not afraid to criticise Kenya for having policies that are contradictory, or at least inconsistent. At the same time, he criticises the Southern African countries also; arguing that they are not able to control poaching, and that their arguments are not sound. To the present writer, he described Kenya as having a contradictory attitude to sovereignty; as saying that elephants are 'common heritage', but then 'turning around and not liking being told what to do'. Our wildlife laws, he says, 'are very clear'; wildlife 'must pay its way outside of parks - that's our legislation'. But, he then argues, 'in international conventions like Ramsar, CITES, Bonn - you give up a part of your sovereignty in interests of preserving biodiversity'. He describes it as a contradiction that the country does not have an Endangered Species Act. Competition, he says, is 'thriving' and it 'has always bedevilled the international trade in ivory' and has 'always been the weakness of the Southern African argument'. If the problem of laundering, he explains, could have been solved before 1989, then the split-listing would not have been a problem. He says that in 1997 he raised the fact that the stockpiles of more

¹⁶⁵³ *Personal Communication* Interview with David Western, Nairobi, 8 October 2004: E Couzens. See (n 1012), (n 1014), (n 1114) and (n 1653).

¹⁶⁵⁴ *Ibid.*

¹⁶⁵⁵ *Ibid.* See 5.3.12, 5.3.20, (n 1171), (n 1196) and (n 1636).

than 500 tonnes, in Sudan, Burundi, and similar countries were a greater threat than were the Southern Africans.¹⁶⁵⁶

Western argues that CITES has, or may have, reached its limits; and that it is not effective as a conservation tool within countries. He contends that part of what this says is that ‘our conservation awareness is way outstripping these conventions, which were set up in previous periods and for different uses’.¹⁶⁵⁷

Questioned as to degrees of knowledge, Western feel that these are poor. People on the ground understand little of CITES; and state parties might have little understanding of each others’ positions. Most people, he says, are largely ignorant of CITES; with the only perception being that it has brought a stop to trade in ivory and rhino horn. This is a problem as it means that only a small percentage of Kenya knows about CITES. This, he says, became apparent just before, and during, the 2000 CITES COP. There would be, he says, a lot more awareness of it here if there was hunting; but he has even ‘heard one of our ministers blame lack of hunting on CITES’.¹⁶⁵⁸ South Africa, he concludes, ‘has misunderstood the Kenyan position’; where, of half a billion US dollars, 80% can be attributed to wildlife - 8% of Kenya’s GDP. Hunting, he says, contributes nothing; and the more extreme groups have hammered the harm to the tourism industry.¹⁶⁵⁹

9.3.6 *Kenyan impositions*

Lapointe has written that ‘Kenya is free to choose how it resolves such issues for its people’; but that ‘[o]ther nations, particularly those who only recently gained independence and freedom, certainly have the right to choose the path they and their people will follow’. Some, he says, of these nations, like ‘Zimbabwe, Namibia, Botswana, and South Africa’ ... in fact ‘look to the surplus of their wildlife resources to help eliminate poverty and fund resource management programs’.¹⁶⁶⁰

Lapointe advises that the ‘transfer of Botswana, Namibia and Zimbabwe’s African elephant populations from CITES Appendix I to Appendix II was the positive result of a long process initiated at the [CITES COP 9], in 1994’. Indeed, he says, that Conference ‘recognized that certain populations of elephants did not meet the CITES criteria for Appendix I even at the time of its initial decision to list them there in 1989’; but that this acknowledgment was nevertheless ‘swept aside when those African States with robust elephant populations had previously attempted unsuccessfully to restore them back to Appendix II’.¹⁶⁶¹

‘Finally it was determined’, writes Lapointe, ‘that all conditions necessary for the resumption of an experimental trade in raw ivory were met by the countries concerned’; and that ‘this fact, written in a report from the Secretariat, was formally agreed to without objection by the

¹⁶⁵⁶ *Ibid.*

¹⁶⁵⁷ *Ibid.* He then advised that a recent national audit has shown that in Kenya only 10-12% of wildlife is to be found in Parks, with 20-25% in council controlled areas and 50% in community controlled areas; and that this shows that one must have national audits, this one showing that Kenya’s parks are not doing a very good job of conservation and that there is a need to bring in private companies and people’. *Ibid.*

¹⁶⁵⁸ See(n 470), (n 933), (n 1226) and (n 2220).

¹⁶⁵⁹ *Personal Communication* Interview with D Western, Nairobi, 8 October 2004: E Couzens.

¹⁶⁶⁰ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 104.

¹⁶⁶¹ *Ibid* at 129-132.

Standing Committee'. He contends that a 'last minute attempt, coordinated by the observer delegation of Kenya to stop the process, was ignored'; and that, 'as a result, the highly regulated trade in raw ivory was conducted smoothly under the control of the Secretariat by the middle of 1999'.¹⁶⁶²

'What has been demonstrated,' argues Lapointe, is that Kenya 'has voluntarily broken the established dialogue and has acted, not in the interest of the range States, but out of its own self-interest, an interest that curiously coincides with NGOs opposed to any sustainable use of natural resources'. Evidently, he says, 'the interests of the three range States concerned, and of South Africa - a nation that expected to see its elephant population transferred to Appendix II - were of no concern to Kenya'. Kenya's proposal, if accepted, 'would seriously impact the welfare of the local human populations, as well as the conservation of the elephant and many associated species in those countries'. 'Considering the success of the experimental trade in ivory', he concludes, 'it was hoped that the [COP] would maintain its support for those range States that have demonstrated their ability to conserve and manage their populations of African elephants in a sustainable way. But to no avail. The once colonial power in Africa, the United Kingdom, used its experience to carve an African compromise with the result that the Southern African countries are left with nothing. The developed nations have again imposed their values'.¹⁶⁶³

9.3.7 *The Kenyan attitude*

In Nairobi National Park, outside Nairobi, Kenya, there is a monument which is the ash pile at the spot where the ivory stockpile was famously burned in 1989. There is also a large marble plinth with a small sculpture of three elephant. A brass plaques on the side of the plinth reads:

GREAT OBJECTIVES OFTEN REQUIRE GREAT SACRIFICES. I NOW CALL UPON THE PEOPLE OF THE WORLD TO JOIN US IN KENYA BY ELIMINATING THE TRADE IN IVORY ONCE AND FOR ALL. H. E. PRESIDENT DANIEL T. ARAP MOI C.G.H., M.P.

The coat of arms of Kenya appears above the writing. On another side of the plinth is a plaque which reads:

THIS MONUMENT WHICH COMMEMORATES THE BURNING OF 12 TONS OF IVORY BY H. E. PRESIDENT DANIEL T. ARAP MOI C.G.H., M.E. ON JULY 18TH 1989 WAS MADE POSSIBLE BY THE GENEROSITY OF THE EAST AFRICAN WILDLIFE SOCIETY AND THE WORLD WIDE FUND FOR NATURE.

The logos of the two societies mentioned appear above the writing.¹⁶⁶⁴

Also at the site of the monument is an information board which, reproduced in full, reads:

A Nation Stands Up For Its ELEPHANT In a period spanning only 20 years, poacher gangs traversed Kenya's rangelands and forests slaughtering rhino and elephant almost to the brink of extinction. Elephant numbers would decline from a high of 130,000 in 1973 to a paltry 16,000 in 1989. An insatiable demand for ivory fueled this slaughter, with a kilo going for as much as 13 US dollars. In 1989, poachers were killing an estimated 1000 elephants a month. It was time to put the foot down ... The Wildlife Department's ammunitions store at the time was full with 2000 tusks meant for sale with bids stretching up to US \$3.2 million. And that is when Dr. Richard Leakey, KWS Director, suggested that it all be torched in symbolic outrage at the international trade in ivory. But would the ivory - made

¹⁶⁶² *Ibid* at 129-132.

¹⁶⁶³ *Ibid* at 129-132.

¹⁶⁶⁴ Personal photograph, Nairobi, 6 October 2004: E Couzens.

up of hard dentine and enamel - burn? And more significant, would the Government of Kenya agree to the burning? Luckily, the idea received the support of President Moi and it turned out that the ivory would burn fiercely if doused in petroleum. **Burn Ivory ... Ban!** On the morning of 18th July 1989, Kenya's Head of State led his country in making a statement of global concern: that Kenya would no longer allow the slaughter of its elephants to satisfy market demand for ivory. On this very spot, he faced a pile of ivory worth an estimated 1 million US dollars and lit a bonfire that was broadcast by television stations across the world. The publicity arising from this historic event stunned the world. The Convention on International Trade in Endangered Species (CITES) (*sic*) placed the elephant on Appendix 1 - in effect enforcing a total ban on trade in ivory. The once lucrative ivory market collapsed, with price per kilo dropping to 1.50 US dollars. In the meantime, a rejuvenated and better-trained KWS ranger force routed poacher elements from Parks. Elephants still face the threat of poaching. In addition, their habitat has declined; their migratory routes are getting closed up as a result of settlement and there exists a fierce competition for resources, which brings the **Jumbos** into conflict with man. **Do Not Collect This Ash!** It must remain, as a symbol of this country's commitment to elephant conservation. And as you picnic here, reflect and join Kenyans in saying "**Never Again**".¹⁶⁶⁵

9.3.8 Kenya's attitude generally

Something of Kenya's ongoing, and deeply felt, opposition to trade in ivory can be seen from a report in June 2002 that members of the new East African regional parliament had become divided over a proposal 'to use ivory in a mace, the ceremonial symbol of the speaker's power'. A report to parliament - a regional grouping of Kenya, Uganda and Tanzania - had recommended creating a mace made of gold and ivory; however, during a debate in parliament in Nairobi, members had objected because trade in ivory is banned. This despite the fact that 'Margaret Kamar, a member of the committee that had made the recommendation, [apparently] said that the ivory would be taken from dead elephants'.¹⁶⁶⁶

At the entrance to the Kenyan Wildlife Service headquarters, Nairobi, in October 2004, with the CITES COP about to take place in Bangkok, there was a large banner which read as follows: 'Kenya Wildlife Service **CITES 2004** We trade, We lose [/] protect our Wildlife Heritage'.¹⁶⁶⁷ For the proponents of the continued Appendix I listing on CITES to be persuaded to change their stance, and remove their opposition to the ivory trade, will clearly require some very convincing arguments by the proponents of commercial trade in ivory.

9.5.9 South Africa and Kenya

South Africa and Kenya are arguably the two African countries best known for wildlife tourism. Their current standpoints on the utilisation of wildlife are, however, direct opposites; Kenya representing the 'preservationist' model and South Africa the 'conservationist'. At some point there will need to be rapprochement between the two - arguably, the compromise arrangement reached on ivory at CITES COP 14 signals a willingness toward such rapprochement.

¹⁶⁶⁵ *Ibid.* According to the Douglas-Hamiltons, writing in 1992, 'Kenya's poached ivory will be burnt every year on [18 July] in an attempt to reduce the commercial value and enable elephants to survive'. I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 288-289. It does not appear, however, that this intended commitment has been adhered to; apart, per Western above, from a 1994/95 stockpile burning. See 5.1.4, (n 1084) and (n 1087); see also (n 1125) and (n 1665).

¹⁶⁶⁶ 'Proposal problems' *The Independent* 8 June 2002 at 5.

¹⁶⁶⁷ Personal photograph, Nairobi, 6 October 2004: E Couzens.

9.3.10 Kenya and whaling

At IWC 54 in 2002, Kenya stated that, although it had not attended for some time, it had ‘nevertheless followed keenly the work of the Commission’. Kenya then referred to ‘its government’s strong commitment to the conservation of whales’; and ‘stressed the importance of tourism and therefore its ecosystem to its economy’. It ‘noted’ that it had been the first African country to ‘establish a marine sanctuary’ and that ‘non-consumptive use’ was a policy that had ‘served it well in both its cultural and economic development’.¹⁶⁶⁸ On whales, then, Kenya and South Africa appear to be *ad idem* - although all other African countries which are Party to the ICRW vote almost exclusively along the pro-whaling line.

9.3.11 Conclusion

The 1989 Appendix I listing of the elephant was an initiative of East Africa, and was achieved despite the opposition of the Southern African region. This position largely persists today, with the competing philosophies of ‘preservation’ and ‘conservation’ being at issue in respect of elephants - Kenya, on one hand, tries to have no consumptive use of wildlife at all; while South Africa, on the other hand, promotes this. There are, of course, arguments to be made for both sides; and eventually middle ground will need to be found. The two countries may, however, not be as far apart as they presently seem to be - they reached a compromise at CITES COP 14; and are the only two African countries which have historically supported the anti-whaling bloc at the ICRW.

¹⁶⁶⁸ IWC ‘Chairman’s Report of the Fifty-Fourth Annual Meeting’ (20-24 May 2002, Shimonoseki) at 32.

10 Aboriginal subsistence whaling

10.1 Generally

10.1.1 Elephants

There obviously is no strong and current tradition of indigenous/aboriginal hunting of elephants. Nevertheless, there are indigenous traditions in and around the areas in which elephants occur of using wildlife resources and products.¹⁶⁶⁹

10.1.2 Aboriginal whaling

Stone is extremely cynical, in respect of whaling; writing that '[t]he practice of making special but limited allowances for aborigines goes back to the now succeeded Convention for the Regulation of Whaling (1931). ... The way I read these restrictions ... I would guess that the predominant original motivation was that of a cartel anxious to close off the threat of commercial competition'.¹⁶⁷⁰

It has been argued, by Parties to the ICRW even, that there is not, or ought not to be, a difference between commercial and aboriginal whaling. Spain, for instance, argued this point at IWC 34 in 1982.¹⁶⁷¹ In the Plenary Session, the Spanish Commissioner said that 'it has been constant in the Spanish delegation's position since our adherence to the IWC that the so called aboriginal or indigenous whaling should be submitted to the same management regime as any other whaling'.¹⁶⁷² The Japanese have themselves made this argument; although arguing for *increased* taking rather than *less*. For instance, at IWC 46 in 1994 Japan explained that it held the view that 'its small-type whaling had the same characteristics as aboriginal subsistence whaling' and that 'hence a similar treatment should be considered'.¹⁶⁷³

The aboriginal, traditional whaling, exemption has been present since the beginning of the ICRW. In the Final Act of the International Whaling Conference, Washington DC, 1946, it was adopted (as a resolution or recommendation) that 'the International Whaling Conference supports and considers justified the request of the Delegation of the [USSR] that the taking of gray whales in the Bering and Chukotsk seas should be permitted when the meat and products of such whales are to be used exclusively for local consumption by the aborigines of the Chukotsk and Korjask areas'.¹⁶⁷⁴ At present, certain indigenous populations, in the US,

¹⁶⁶⁹ A contrary view comes from Parker, who comments cynically that '[n]o doubt rhino and rhino horn figure in the grab bag of some Zambian cultural traditions, but in the twentieth century the overriding 'cultural use' of rhino horn had been to sell it overseas'. I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 319.

¹⁶⁷⁰ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 281-82. Stone explains that 'Article 3 of this original whaling regime declared: "The present convention does not apply to aborigines dwelling on the coasts of the territories of the High Contracting Parties provided that: (1) They only use canoes, pirogues or other exclusively native craft propelled by oars or sails; (2) They do not carry firearms; (3) They are not in the employment of persons other than aborigines; (4) They are not under contract to deliver the products of their whaling to any third person" ...'. *Ibid* at 281-82.

¹⁶⁷¹ IWC 'Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton) *Verbatim Record* at 73.

¹⁶⁷² Spanish Commissioner, IWC 'Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton) *Verbatim Record* at 170.

¹⁶⁷³ IWC 'Chairman's Report of the Forty-Sixth Annual Meeting' (23-27 May 1994, Mexico) at 17.

¹⁶⁷⁴ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 697.

Greenland and Russia, for example, are exempt from the IWC Commission moratorium on whaling. Japan is arguing that its indigenous coastal populations should likewise have the right to whale.

Friedheim tells us that '[t]he IWC actually controls very little of the whaling that is conducted around the world today'.¹⁶⁷⁵ However, it can surely be contended in response, that without the IWC and its controls there would doubtless be far more whaling than there is presently. Freeman suggests that '[a]lthough the IWC regulates less than [seven] percent of whaling taking place in the world today, nevertheless the ongoing cultural conflicts create persistent problems for those societies that chose to maintain a tradition of consuming whale products for food'.¹⁶⁷⁶

According to Komatsu and Misaki; there are four nations which are permitted to whale under aboriginal subsistence whaling. These are the US (Alaskan Inuits and the Makah tribe), Russia (the Far East region of Chukotka), Denmark (Greenland) and St Vincent and the Grenadines (Island of Bequi). The IWC definitions, the authors contend, are 'somewhat ambiguous'. Commercial whaling, they say, is 'a straightforward proposition: whaling undertaken for financial gain made through selling the catch'; and that one would presume therefore that 'it would then differ from aboriginal subsistence whaling, which you would not expect to be based upon financial transactions'. However, they contend, there is 'no IWC definition forbidding the sale of meat and other whale products from those permitted to whale under the aboriginal subsistence category' with the only rule being 'that the meat should be consumed within the region from which it was taken'; and that, '[i]nterestingly,' there is no definition of 'region' either. Today, they say, the reality worldwide is that no society functions without a currency of some sort; and that, as '[t]o catch a whale, a boat needs to be maintained, its crew needs to be paid, [and] fuel has to be bought' there is 'simply no escaping the financial realities of modern life'.¹⁶⁷⁷

While it is commercial whaling that Japan is most concerned with, any clues which point to whaling having symbolic, rather than financial, value to its proponents are important for the argument that it is an entire philosophy of use that is being fought for rather than simply the use of one species. This argument is strengthened, not weakened, when one considers that these communities do take many small cetaceans annually - between 17 000 and 19 000 Dall's

¹⁶⁷⁵ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 11-12. Friedheim writes that '[i]n addition to the hunts conducted under the auspices of the Japanese and Norwegian governments (about a thousand minke whales between them), Canada's native take, the Faeroe Islanders' hunts for pilot whales, and Greenland natives' hunts for the narwhal and beluga (both Greenland and the Faeroe Islands are under Danish sovereignty but have home rule) are also beyond IWC control. ... the Philippines (a former member of the IWC) and Indonesia, where it is known that whaling occurs, are careful to remain outside the jurisdiction of the commission. A stalemate indeed! The like-minded states control the IWC, but they do not control whaling'. *Ibid* at 11-12. Canada does appear to allow a very small number of bowhead whales to be taken by its Inuit people - see, for instance, a recent story on an Inuit community being chosen as the community which would be allowed to hunt a bowhead whale in 2008 - 'Kugaaruk chosen for bowhead whale hunt' *CNC News* 10 December 2007 <http://www.cbc.ca/canada/north/story/2007/12/10/whale-hunt.html> (accessed 2 June 2008).

¹⁶⁷⁶ M M R Freeman 'Culture-Based Conflict in the International Whaling Commission: The Case of Japanese Small-type Whaling' in W CG Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 33 at 35-36. 'The IWC', per Freeman, 'exerts management authority over baleen whales and sperm whales, but not over long-finned and short-finned pilot whales, pygmy and false killer whales, melon-headed whales, Baird's and Cuvier's beaked whales, beluga and narwhal which are the main whale species taken by various nations'. *Ibid* at 35-36, fn 10.

¹⁶⁷⁷ *Ibid* at 111-112.

porpoises, for instance, according to some estimates¹⁶⁷⁸ - and that the calls for 'interim relief' for coastal communities in Japan are arguably therefore disingenuous.

10.2 Bowheads and Inuits

10.2.1 *The bowhead issue*

Although, due to space constraints, this thesis is not going to consider aboriginal subsistence whaling in great detail, it is important to consider the issue of bowhead whaling - given the importance this has for the current political state of the IWC.

Komatsu and Misaki write that '[t]he most glaring IWC double standard, ... is the stance of the United States, which enthusiastically encourages the Alaskan Inuit whaling of the endangered bowhead whale with a five-year quota (rather than a one-year quota with greater room for scientific review). Unfortunately, it promotes the Alaskan Inuit whaling while doing everything in its power to deny the JSTCW bid for a small one-year quota for the prolific minke whale'.¹⁶⁷⁹ This creates a difficult conundrum for Japan. Japan must support the US' indigenous whaling on principle - even though it is hypocritical in Japan's eyes.

The United States is in an extremely difficult position; caught between domestic and international commitments. Glavovic writes that '[u]nlike the rights of the native Americans on the rest of the North American continent, the rights of the indigenous inhabitants of Alaska have no foundation in treaties. The US acquired Alaska, not by conquest or colonial inheritance, but by purchase. There were no wars between the tribes and the US, followed by negotiated or prescribed settlements in the form of treaties, forced removals, or establishment of reservations'. In consequence of this, there was, 'therefore, no formal recognition at any stage' of these peoples' aboriginal tenure rights. However, there has been, he explains, an 'acknowledgement by the federal government and the supreme court of the continuing existence of their rights to their historical lands, ... [a] backdrop of acknowledgement, notwithstanding the lack of prior formal recognition of indigenous land rights'.¹⁶⁸⁰

On this difficult position; M'Gonigle tells us that 'in 1977 t]he IWC made [a] decision on quota levels that was to have significant repercussions'; and that '[s]ince the 1930s, the bowhead whales of the Arctic had been protected from commercial whaling, having been heavily exploited by such whaling in the nineteenth century'. Despite this overharvesting, 'an exception had been granted on harvesting these whales that allowed the Alaskan Inupiat Eskimos to take an estimated ten whales each year'; a kill figure which, in recent years, had, however, escalated - reaching a total of 48 in the 1976 hunt and 26 in 1977, with another 77 being 'struck but lost'. This total, says M'Gonigle, 'far exceeded that which would have been allowed even with a healthy sustained management stock'; and that at the IWC Meeting in

¹⁶⁷⁸ The UK-based environmental NGO, EIA, estimated in 2006, for instance, that 350 000 Dall's porpoises have been killed by Japanese fishermen since the commercial whaling moratorium of 1986. 'Campaigners Demand Governments Unite Against Japan's Massive Porpoise Hunt' *Environmental Investigation Agency* 16 June 2006 <http://www.eia-international.org/cgi/news/news.cgi?t=template&a=313> (accessed 2 June 2008). It has been estimated that about 18 000 are taken annually; from a North Pacific population of 'possibly' 1.2 million. See, for instance, 'Dall's porpoise' *NOAA Fisheries: Office of Protected Resources* <http://www.nmfs.noaa.gov/pr/species/mammals/cetaceans/dallsporpoise.htm> (accessed 2 June 2008). See 2.4.5, (n 411), (n 1796) and (n 1823) on 'small cetaceans' taken in Japan.

¹⁶⁷⁹ *Ibid* at 112-113.

¹⁶⁸⁰ P D Glavovic *Wilderness and the Law* (1995) at 130-131.

Canberra, the exception was revoked and a zero quota set for the species. This move meant that the US, with pressure from the Inupiat on one side and from the whale protectionist lobby on the other, found itself 'in a difficult political situation'.¹⁶⁸¹

Norway once described the bowhead whale issue as 'a difficult and contentious issue' and said that '[t]here are elements in it which strike at the heart of the conscience of scientists, and there are elements in it which are of an important political nature'.¹⁶⁸²

Aron writes, from the perspective of the 21st Century, that '[i]n the face of the conservative harvests allowed for [certain] species, the gray whale has increased sufficiently to be removed from the Endangered Species List, and the bowhead population has also enjoyed significant increases'.¹⁶⁸³

From the perspective of 2002, where the US called an intersessional meeting after having its indigenous hunt prevented,¹⁶⁸⁴ it is instructive to look back at the events surrounding the bowhead whale quota in the late 1970s.¹⁶⁸⁵ Behind mere history, in fact, these events imply that the extraordinary IWC meetings of 1977 and 2002 are part of a US pattern of behaviour; of a pattern of a state manipulating the institutions of international legal decisions in order to get what it wants. Although already canvassed to an extent, it is worth at this point recounting some of what happened in the late 1970s.

According to Day, the events of 1977 were to change forever the position of the United States at the IWC. He writes that '[b]y December 1977 there was very bad news indeed at the IWC' as '[i]t was becoming evident that America was not acting convincingly in its role as the IWC policeman' and 'environmentalists started to sense a double-cross in the making'. His assessment is that 'behind the US abdication as leader and enforcer of the international drive to save the whales' was 'as might be expected, internal American politics'. He describes the controversy as having been one that 'tied America in knots'; and which had as a result that 'America would never fully recover its once clear stance on the whaling issue'.¹⁶⁸⁶

Day argues that the bowhead whale became seriously endangered; and that the pro-whaling IWC members seized on their plight to wring an advantage out of the United States. All was, it seems, politics, horse-trading and hypocrisy. In Day's words, the bowheads 'fell to an all-time population low - perhaps 2 000 to 3 000 - and conservationists called for a halt to the slaughter';¹⁶⁸⁷ but that the whaling nations 'now grasped with both hands the perfect opportunity to incapacitate the American conservation effort' and 'voted for a total banning of bowheads 15-0 with one US abstention, in the IWC Scientific Committee meeting'. Japan and

¹⁶⁸¹ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 153-154.

¹⁶⁸² Norway Commissioner, IWC 'Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton) *Verbatim Record* at 172.

¹⁶⁸³ W Aron 'Science and the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 105 at 120-21.

¹⁶⁸⁴ See 3.3.10 and 10.2.

¹⁶⁸⁵ See 3.2.3, 3.2.4, 3.2.6, 3.2.7 and 3.2.8.

¹⁶⁸⁶ D Day *The Whale War* (1992) at 50-54. 'Between 1913 and 1970', writes Day, 'Alaskan Eskimos continued their traditional bowhead hunts, taking from 10 to 20 whales each year. This was certainly a peripheral issue. ... In the 1970s there began a disastrous increase in Eskimo hunting: from fewer than 20 a year as many as 100 were being killed. In 1976 48 bowheads were killed and landed, and another 43 were struck and lost, and undoubtedly died. In 1977 26 were killed and landed while 78 others were struck and lost'. *Ibid* at 50-54.

¹⁶⁸⁷ *Ibid* at 50-54.

the other whalers, he explains, then ‘began a horse-trading session with the Americans - sperm whale for bowheads - in the closed-door commissioners’ meeting at the IWC’; and the US thenceforth ‘found itself unable to argue for a moratorium on whaling’ - instead finding itself, ‘against its own and IWC scientific advice, fighting primarily for the highest possible bowhead quota for the Eskimos’. The currency of the Convention, he observes cynically, was changed to that of ‘bowheads’, with one bowhead equalling approximately 200 sperm whales; the whaling nations managing to ‘neutralize their greatest foe’ between the ‘Save the Whale lobby’ and the ‘Save the Vote in Alaska lobby’.¹⁶⁸⁸

In the late 1970s, Scarff wrote that ‘[t]he most endangered whale species is unquestionably the bowhead (*Balaena mysticetus*)’. ‘Once abundant’, he wrote, ‘in the arctic waters of both the North Atlantic and North Pacific ... [t]he harvesting was so thorough that by the beginning of this century, over thirty years before the establishment of the IWC, commercial whaling on bowheads had ceased’. However, he continued, all treaties and statutes exempt ‘aboriginal’ or Eskimo whaling.¹⁶⁸⁹ He then suggests that the IWC, for a long while, ‘ignored the bowhead issue both in order to avoid delicate political and ethical questions and as a result of its concentration upon regulating commercial whaling’.¹⁶⁹⁰

M’Gonigle records that at IWC 30 in 1978 the major issues on the agenda, once again, were that of the sperm whale and the bowhead. In Scientific Committee debates, apparently it was only advisors from the FAO and IUCN who played a major role in challenging the analyses of the numerous scientists from Japan and - ironically, with hindsight - Australia.¹⁶⁹¹ A contemporary commentator, the media publication *ECO*, apparently suggested that ‘the performance of the US scientists was especially dismal ... Time and time again, they sat silent when they should have been questioning. When they did speak it was on behalf of the industry, not the whales’. It seems that the US, once again, was paralysed by the bowhead controversy. In the year since the aboriginal exception had been revoked in Canberra, says M’Gonigle, ‘the Alaskan Eskimos had abided by the IWC quota’ and the US government ‘had undertaken extensive research on the Arctic bowhead population’. The research, he records, was still incomplete, but it indicated a larger population than previously had been estimated.¹⁶⁹² The cynical observer, such as the present writer, might comment on the apparently fortuitous convenience of this population increase.

The US, per M’Gonigle, ‘again proposed to place authority over the quota back in its own hands’ - this time by asking the Commission to set a ‘guideline’ of 2% of the estimated population (approximately 45 whales) ‘within which it would set quotas adequate to meet aboriginal needs’. The Scientific Committee, however, ‘reiterated its position that, on biological grounds, no whales should be taken, and there was fierce disagreement over figures’.¹⁶⁹³

¹⁶⁸⁸ *Ibid* at 50-54.

¹⁶⁸⁹ J E Scarff ‘The International Management of Whales, Dolphins, and Porpoises: An Interdisciplinary Assessment (*Part One*)’ (1977) 6 *Ecology Law Quarterly* 323 at 400-403.

¹⁶⁹⁰ *Ibid* at 400-403.

¹⁶⁹¹ Australia announced in 1979 that it would cease whaling, after publication of the *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume 1* (1978). See also, generally, A Darby *Harpoon: Into the Heart of Whaling* (2007).

¹⁶⁹² R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly*

¹¹⁹ at 161-164.

¹⁶⁹³ *Ibid* at 161-164.

It is a supreme irony that in the paragraph above the United States is seen arguing that the Scientific Committee should be overridden, with the SC arguing that whales are endangered; today, at the present time of writing, we see the US arguing that the SC should be overridden, with the SC arguing that whales are *not* endangered.

The Eskimos from the US delegation apparently argued that the population was in fact even larger than the new figure presented, while others apparently argued that the proposed 2% guideline far exceeded the survival rate of newborn whales and that it was not justified on the basis of aboriginal needs. According to M'Gonigle, the debate 'was painful to conservationists who saw their champion neutralized again'; as the US scientists had not only 'performed with minimal zeal in the Scientific Committee, but the United States was receiving support on its proposals from the whaling nations - support that must have had a price'.¹⁶⁹⁴

The politics surrounding the 1978 decisions appear to have been Byzantine in complexity. As Birnie describes events, the IWC elects its own Chairman and Vice-Chairman and determines its own Rules of Procedure; a fact which can have important effects on substantive issues. She explains that this has meant 'arbitrary decisions' being taken on some important issues'; and recounts, as an example, 'the late night addition of whales to the Alaskan Eskimo catch quota of bowhead whales at the 30th Meeting in 1978, without prior notification of the item by the United States'. She explains that '[a]s no member of the Commission objected to this breach of Rule XII which requires 60 days notice, no further action could be taken'.¹⁶⁹⁵

In February 1979 a special Panel Meeting of Experts was convened under the IWC's auspices in Seattle, Washington, to consider aboriginal/subsistence whaling - and to assist the IWC Technical Committee in formulating proposals for a regime to regulate aboriginal bowhead whale hunting in Alaska and, possibly, regimes for other aboriginal hunts also.¹⁶⁹⁶ The Panel concluded that, ideally and in 'strictly biological terms', no Bering Sea bowhead whales should be hunted at all, as the current stock was 'a small percentage of its initial size in 1850'; that there were adequate replacements, such as gray whales, walrus, seals, polar bears, caribou, birds and fish, available in the area and that the Eskimo diet would not suffer from such replacement. The Panel concluded further, on the other hand, that such a change would have a significant effect on the culture of these whaling communities.¹⁶⁹⁷ In this regard, the Panel concluded that, although cultures are 'dynamic and resilient', natural changes are of a very different nature to 'mandated change imposed from outside'; and that any attempt to regulate behaviour from outside should, therefore, 'involve the local communities to the fullest extent possible' to achieve as much acceptance as possible.¹⁶⁹⁸

¹⁶⁹⁴ *Ibid* at 161-164. 'The support', says M'Gonigle, 'was evident in the many proposals and votes that occurred throughout the debate. Japan and the USSR consistently voted with the United States, and Denmark and Norway also provided support. In one awkward and amusing moment, the USSR was called to vote before the United States, and it postponed its vote until the Americans had declared their position and then voted with them. ... A long, vituperative debate over the level of allowable kill ensued. When the Technical Committee accepted a quota of [24] landed with no limit for "struck" whales, the Eskimos walked out and denounced the Commission'. *Ibid* at 161-164; and fn 209.

¹⁶⁹⁵ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 174.

¹⁶⁹⁶ IWC 'Report of the Panel Meeting of Experts on Aboriginal/Subsistence Whaling' (5-9 February 1979), Seattle, at 1.

¹⁶⁹⁷ *Ibid* at 1-2.

¹⁶⁹⁸ *Ibid* at 2.

M’Gonigle writes that the bowhead whale was again a major issue in 1979. The Scientific Committee in its report had, apparently, ‘reiterated its call for a zero quota’; and biologically, he says, a quota of 20 landed and 27 struck but lost would be highly damaging. His assessment is that, culturally, few saw this quotas as being necessary; but that, politically, the US wanted it. Although there was little discussion of the bowhead quota, he comments, ‘the American demand overshadowed all other political calculations’.¹⁶⁹⁹ ‘By the evening of the first day, it seems that a compromise proposal made by the US on commercial whaling was being discussed; this being for ‘a complete commercial moratorium, but to take effect only after three years’. Although this was apparently denied by officials, many, per M’Gonigle, ‘viewed the weaker proposal as the result of a political trade with Japan in exchange for its support on a bowhead quota’. In the event, however, ‘[i]ntensive conservationist lobbying quickly forced the United States to withdraw the proposal’.¹⁷⁰⁰

In 1979, Australia provided most opposition to the US demand for an aboriginal quota of bowhead whales; arguing that ‘the only safe course [was] for a zero kill of bowhead whales from the Bering Sea stock’ on the ground that there was a ‘very real danger that this species is on the brink of extinction’.¹⁷⁰¹ The US responded vigorously, with its Commissioner arguing that in his view ‘a vote for a zero quota [would be] a vote against aboriginal peoples and a vote against the bowhead whales’ - his argument being that he believed that ‘more bowhead whales will be killed with a zero quota than they will with a reasonable quota’.¹⁷⁰² This statement was to have a significant echo at the intersessional meeting in October 2002; when the Commissioner for Russia argued that a vote against the bowhead quota, for which the US and Russia were arguing, would be a ‘vote against people’.¹⁷⁰³

The Commissioner from the US then argued again that ‘[w]e have, in addition to an endangered species of whale, an endangered stock of whale, here, an endangered culture’; and that he thought that the quota proposal then under discussion [at the time 12 whales landed, or 18 struck] was ‘not only bad for [E]skimos and will not [be] complied with, and my Government will not tell [E]skimos it is fair, but [] also [that it would not be] good for the whales because of what will result’ - he then proposed an 18 taken and 26 struck quota instead.¹⁷⁰⁴ The South African Commissioner then suggested that this was ‘in fact more a people problem than a whale problem’ and expressed concern that they would in subsequent years ‘always be facing the same problem.’ He suggested further that, while one might argue about numbers, what was needed was ‘either a more imaginative solution to this problem, or else [] some commitment on the part of the United States that we will not be faced every year

¹⁶⁹⁹ R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 173.

¹⁷⁰⁰ *Ibid* at 174.

¹⁷⁰¹ Australia Commissioner, IWC Report of the Plenary Sessions of the Thirty-First Meeting (9-13 July 1979), London *Verbatim Record* at 151.

¹⁷⁰² US Commissioner, Mr Frank, IWC Report of the Plenary Sessions of the Thirty-First Meeting (9-13 July 1979), London *Verbatim Record* at 152-153.

¹⁷⁰³ IWC ‘Chairman’s Report of the 5th Special Meeting’ (14 October 2002, Cambridge) in G P Donovan (ed)/IWC *Annual Report of the International Whaling Commission 2003: Covering the 2002-2003 Financial Year and the 55th Annual Meeting held in Berlin in 2003* (2004) at 143. See (n 545) for the full quote from the Russian Commissioner, who argued that the only question to be decided was that of ‘whether people should eat or starve’.

¹⁷⁰⁴ US Commissioner, IWC Report of the Plenary Sessions of the Thirty-First Meeting (9-13 July 1979), London *Verbatim Record* at 159-161. [Commissioner: Mr Frank.]

with having to decide between the whales and the people'.¹⁷⁰⁵ Parties then voted on the 18 taken/26 struck quota proposal. France, Norway, The Seychelles, South Africa, the United Kingdom, Brazil and Canada abstained; The Netherlands, New Zealand, Panama and Australia voted against; and Denmark, Iceland, Japan, Korea, Mexico, Peru, Spain, Sweden, the USSR, the USA, Argentina and Chile voted in favour. The vote was therefore 12:4, with seven abstentions; the requisite three-quarters majority was attained, the Schedule amended, and the quota approved of.¹⁷⁰⁶

It is interesting and illuminating to look at the events of 1978 and 1979 from the perspective of later events - and this is why so much time has been spent on them.¹⁷⁰⁷ As has,¹⁷⁰⁸ and will, be seen, in 2002 the meeting in Shimonoseki and the extraordinary meeting in Cambridge saw similar events, and machinations which brought ostensible opponents together. Also, there were portents that the 2006 meeting in Anchorage, Alaska, might have seen similar events also. While the latter meeting did not, in the end, see similar dramatic events; there were subtle political ramifications on the matter which might, ultimately, prove to be of great significance.¹⁷⁰⁹

Birnie writes that at IWC 32, held in Brighton in 1980, the US announced a major policy change; which was that it now recognised that, 'based on an alleged scientific analysis, a sustained hunt at present levels over an extended period would endanger this herd but it sought a continued short-term quota to allow time for Eskimo attitudes to change, while they examined the data, and for alternatives to be developed'. Securing Eskimo support for the change, according to the US, would be 'the best approach and a small take would not adversely affect the stock'.¹⁷¹⁰

At IWC 32 the US, faced once again with firm opposition from Australia and Canada, and with both the Scientific Committee and the Technical Committee having recommended (by majority votes) zero quotas, announced that it would be recommending a reduction in the catch in the next year - despite Eskimo needs not being fully satisfied by the existing quota. Eventually, a proposal by the Chair, seconded by Denmark, was adopted (16:3, with five abstentions) providing that in the years 1981-1983 45 whales might be landed and 65 struck, with no more than 17 being landed in any one year.¹⁷¹¹

According to the US Commissioner, arguing again against a zero quota, the Alaskan aboriginal take was 'an historic take that has occurred over a 4 000 year period';¹⁷¹² arguing

¹⁷⁰⁵ South Africa Commissioner, IWC Report of the Plenary Sessions of the Thirty-First Meeting (9-13 July 1979), London *Verbatim Record* at 162-163.

¹⁷⁰⁶ IWC Report of the Plenary Sessions of the Thirty-First Meeting (9-13 July 1979), London *Verbatim Record* at 167.

¹⁷⁰⁷ I do realise that I have covered much of the same ground as earlier, but considered it necessary to discuss what happened in the 1970s in both sections to give context and necessary understanding.

¹⁷⁰⁸ See 3.3.9 and 3.3.10.

¹⁷⁰⁹ See 3.3.25 to 3.3.34.

¹⁷¹⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 604-605.

¹⁷¹¹ IWC 'Chairman's Report of the Thirty-Second Annual Meeting' (21-26 July 1980), Brighton at 18.

¹⁷¹² Certainly, bowhead whaling appears to have ancient origins. Interestingly, it has been suggested that '[i]n primitive whaling, people tended to selectively choose calves or juveniles', for the obvious reason that these were easier to take than were adults. Park suggests that 'the Eskimos who hunted bowhead whales in leads created in the ice fields along the north Alaskan coast only took juveniles, and when mature animals appeared, they would drive them away by flinging pieces of ice at them'. K Park 'Cetaceans and Whaling in the Bangudae Rock Engravings' in Institute of Cetacean Research and Japan Whaling Association (eds) *The 2nd Summit of Japanese Traditional Whaling Communities: Report and Proceedings 11*

that ‘for four thousand years these Eskimos have been taking whales and now some people in this Commission would stop that tradition’.¹⁷¹³ ‘In sum’, he concluded, ‘a zero quota will result in the extinction of this culture. It will satisfy us in no way to allow for a minority in the United States to engage in a cultural practice which it has engaged in for four thousand years’.¹⁷¹⁴ The US Commissioner proceeded to argue, as he had the year before, that it was his personal view that ‘if there is a zero quota we will have substantial difficulty in enforcement. ... [and that] whales will be taken without regard to this quota even though individuals may be imprisoned or fined for their violations of our law. I do not think whales benefit from an unreasonable quota which results in violations’.¹⁷¹⁵

Australia admitted to having a ‘strong sympathy for the position of the Eskimos and their desire to retain their traditions and to make their own decisions about how best to manage bowheads’; but argued that ‘[i]n the past the Eskimo culture [had] proved to be sufficiently resilient’ and that ‘[t]he greatest threat to the Eskimo culture is not a transitional period of restraint in harvesting bowheads’ - rather, that the pressures of a modernising world provided a greater threat.¹⁷¹⁶ Pressed, particularly by the Seychelles which proposed a quota of 12 struck or eight landed for the next year, the US Commissioner then said that his ‘Government [] has stated unequivocally that next year it will recommend to this Commission a downward turn in the quota’ and requested a ‘transition year of a quota at last year’s levels, 18 and 26’.¹⁷¹⁷

In the result, a compromise position was reached.¹⁷¹⁸ After informal consultations, the Chair proposed a solution - that a quota for the years 1981-1983 be adopted, as outlined above. In the end, the proposal received 16 votes in favour (New Zealand, Oman, Peru, Seychelles, Spain, Sweden, Switzerland, USSR, UK, Australia, Chile, Denmark, Iceland, Japan, Korea and Mexico); three votes against (Netherlands, South Africa and Canada); and five abstentions (Norway, US, Argentina, Brazil and France).¹⁷¹⁹ It is extremely curious that the United States abstained in the vote; but, given the apparent extent of lobbying behind the scenes, it was presumably satisfied in advance as to what the result of the vote would be. In his submission during debate on the Chair’s proposal, the US Commissioner had expressed satisfaction with the figure - saying that ‘[i]t is my hope that this figure, which the Commission believes is correct, is one which will allow [the Eskimo] culture to survive. It is my view that it will’.¹⁷²⁰

March 2003 (2004) 43 at 63.

¹⁷¹³ US Commissioner, IWC Report of the Plenary Sessions of the Thirty-Second Annual Meeting (21-26 July 1980), Brighton *Verbatim Record* at 25.

¹⁷¹⁴ *Ibid* at 25-26.

¹⁷¹⁵ *Ibid* at 26. The US Commissioner then went on to hint at possible hypocrisy on another state’s part; pointing out ‘it is my understanding that the policy of [the Canadian] Government is to allow somewhere between 40 narwhal whales to be taken per year, belugas rather, out of a stock of 400 animals. We are asking for a take of 18 whales out of a stock of 2 300 animals’ - he did, however, concede that ‘different stocks have different population dynamics’. *Ibid* at 26-27.

¹⁷¹⁶ Australia Commissioner, IWC Report of the Plenary Sessions of the Thirty-Second Annual Meeting (21-26 July 1980), Brighton *Verbatim Record* 29-30.

¹⁷¹⁷ US Commissioner, IWC Report of the Plenary Sessions of the Thirty-Second Annual Meeting (21-26 July 1980), Brighton *Verbatim Record* at 39.

¹⁷¹⁸ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 604-605.

¹⁷¹⁹ IWC Report of the Plenary Sessions of the Thirty-Second Annual Meeting (21-26 July 1980), Brighton *Verbatim Record* at 178.

¹⁷²⁰ US Commissioner, IWC Report of the Plenary Sessions of the Thirty-Second Annual Meeting (21-26 July 1980), Brighton *Verbatim Record* at 175.

Birnie tells us that at IWC 33, in 1981, although the SC continued to recommend a zero quota for the Bering Sea bowhead stock ‘or that, if it were not to be totally protected, the number struck and lost should at least be reduced’, the Commission, without debate, continued the three year block quota that had been agreed to in 1980 unchanged. The only *caveat* was a caution, ‘by resolution, that only immature whales should be taken and that the numbers struck must be reduced’. The US apparently reported on ‘the Eskimos’ excellent record of compliance with a new enforcement system which the Eskimos themselves operated and stated that improved data collection indicated a stable rather than a declining population’.¹⁷²¹

It is, of course, not unexpected that the scientific data reported by the United States was favourable to its position; a clear strand running through the entire history of the IWC has been the production by members of scientific evidence favourable to their positions. By the next meeting, however, the US and Japan were no longer *ad idem*; Birnie reporting that ‘at IWC 34, 1982, ‘attempts to reopen the three year block quota were abandoned’.¹⁷²² Japan, at this meeting, argued against the practice followed by the US of bringing representatives of the Eskimos into management, decision making and enforcement procedures; which practice Japan called effectively allowing third parties to amend the Schedule.¹⁷²³ Ironically, again, Japan has in more recent times brought extensive delegations to IWC meetings - including representatives from its whaling communities; of course, it is unknown to what extent these representatives have influenced Japanese decision-making.

The controversy continued at each successive meeting. Birnie writes that ‘at IWC 35, 1983, the US three year block quota had reached an end; and that the ‘SC had adopted an estimate of about 4 000 whales for this stock, which therefore should be classified as PS, with a zero catch limit’. The SC, she says, ‘tried to provide advice according to the new criteria for aboriginal subsistence management procedures but was unable to do so because of various uncertainties’; and that it, therefore, recommended that a one-year limit be set for 1984, keeping the number of whales below 22. The US, however, argued in favour of a limit of 35, ‘based on the needs of aborigines and conservation’. The US government did not dispute the SC’s advice but said that ‘it had failed to convince the Inuits that a higher quota would not damage the stock’. The TC had recommended a three year quota of 42 struck, with not more than ten landed, in any one year. ‘After many proposals and counter-proposals failed’, says Birnie, ‘a compromise’ of a two year quota of 43 strikes for 1984 and 1985 ‘was agreed by consensus’, with no more than 27 strikes in any one year, and ‘the quota being open to review on the basis of scientific advice’. For the first time since this issue arose, she concludes, ‘no distinction was made between whales struck and landed, increasing the pressure for accuracy in killing’.¹⁷²⁴

By the time of IWC 46, in 1994, it was reported that the Bering-Chukchi-Beaufort Seas stock of bowhead whales had been ‘increasing under a regime of catches of some 15-50 animals since 1978’. The SC considered an annual take of 104 animals to be sustainable; and the US asked the TC to endorse a quota of 51 landed whales from an annual total of 68 strikes.¹⁷²⁵ In Plenary Session, however, the US revised its proposal, so as to ask that the total landed in the

¹⁷²¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 611.

¹⁷²² *Ibid* at 619.

¹⁷²³ *Ibid* at 619.

¹⁷²⁴ *Ibid* at 629.

¹⁷²⁵ IWC ‘Chairman’s Report of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) at 21.

four years 1995-1998 not exceed 204, with up to 68 strikes in 1995, 67 in 1996, 66 in 1997 and 65 in 1998. Several countries expressed the desire for a more cautious approach, especially as no limit was placed on the number of whales that could be carried forward from any season, but the proposal was carried unanimously.¹⁷²⁶ It appears that the US has, while asking for annual quotas, adopted a policy of proposing (as compromise) totals spread over several years - initially over three years; then over four; and, as will be seen, eventually (and currently) over five.

At IWC 49 in 1997, the Russian Federation asked for an aboriginal subsistence quota of five bowhead whales from the Bering-Chukchi-Beaufort Seas stock. The US asked for a quota for its Alaskan people of 67 strikes per year, for five years - but this would be a joint US-Russian proposal, with the number of carry-over strikes being increased from 10 to 15 to accommodate this. The US explained that the proposal had been developed 'in the context of strikes and carry-over rather than landed whales in order to provide flexibility'; this being because the SC and the IWC consider all whales struck, not merely those landed, as mortalities. The US argued therefore that counting strikes was a 'more conservative approach than developing a proposal on the number of landed whales'.¹⁷²⁷

The take of bowhead whales by the Russian Federation does not appear to be of great numerical significance. At IWC 52 in 2000, for instance, it was reported that in 1999 '48 whales had been struck, with 43 landed' from the Bering-Chukchi-Beaufort Seas stock of bowhead whales. These figures 'included one whale struck and landed by the Russian Federation'.¹⁷²⁸ The Russian Federation takes many more gray whales, though.¹⁷²⁹

10.2.2 What happened at Shimonoseki in 2002

At IWC 54 in 2002, in Shimonoseki, the debate over ASW took a dramatic turn. The Scientific Committee's Standing Working Group (SWG) recommended a 'Bowhead Strike Limit Algorithm (SLA)' which was 'intimately linked to the generic aspects of the Aboriginal Whaling Management Procedure (AWMP)'; and in five-year blocks, with inclusion of the concept of carryover. The Chair of the SWG (Greg Donovan of the Secretariat) then 'noted the Scientific Committee's conclusion that, from a purely scientific perspective, the 'Bowhead SLA' represented the 'best tool for providing management advice to the Commission on the bowhead whale harvest'.¹⁷³⁰ Japan indicated that it supported the adoption of the 'Bowhead SLA' in principle, but felt that 'implementation should await the resolution of other issues'.

¹⁷²⁶ *Ibid* at 22-23.

¹⁷²⁷ IWC 'Chairman's Report of the Forty-Ninth Annual Meeting' (20-24 October 1997, Monaco) at 27.

¹⁷²⁸ IWC 'Chairman's Report of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide) at 20.

¹⁷²⁹ At IWC 59, the Russian Federation explained that in the period 2003-2006 480 gray whales were taken - with 400 tonnes of whale products being obtained from 129 whales in 2006. The Russian Federation then suggested that the people of Chukotka need 350 gray whales and five bowhead whales a year, of the size and weight of the whales taken in 2006. It was suggested that Chukotkan people need approximately 30kg of edible whale products per individual person per year. See R G Borodin, V Yu Ilyashenko, D Litovka, V M Yetylin & O V Yetylina 'Rationale for Needs of Aboriginal People of Russian Federation for Gray and Bowhead Whale Harvest in 2008-2012' IWC/59/ASW 3rev Agenda items 6.1 & 6.2 8 May 2007 http://www.iwcoffice.org/_documents/commission/IWC59docs/59-ASW3rev.pdf (accessed 2 June 2008). In the end, a total of 620 Eastern North Pacific gray whales were approved for taking in the period 2008-2012, with a maximum of 140 to be taken in any one year. A total of 280 bowhead whales (up to 67 in any one year) were approved for taking in the same period. The Commission did not allocate numbers respectively to the Alaskan and Chukotkan people. 'Day 2 - Tuesday 29 May' in 'Chair's Summary Report for the 59th Annual Meeting, Anchorage, Alaska, 2007' <http://www.iwcoffice.org/meetings/meeting2007.htm>. See 3.3.27 and 3.3.29.

¹⁷³⁰ IWC 'Chairman's Report of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki) at 12-13.

Japan also pointed to what it felt were double standards between the RMP and the AWMP; arguing that ‘application of the RMP would result in a catch limit of zero for the next 30 years’ whereas application of the ‘SLA’ would give a limit of 67 per year.¹⁷³¹

On the Bering-Chukchi-Beaufort Seas stock of Bowhead whales, it was reported by the Scientific Committee that a ‘total of 75 whales was struck during the 2001 harvest and 49 (30 male and 19 female) were landed’. The low figures landed were accounted to difficult ice conditions. Off Chukotka, one female was reported to have been harvested in 2001. The SC then advised that the stock appears to be larger than at any time in the last century, and to be increasing; the Committee gave the same advice as in 2001; that it was ‘very likely’ that an annual catch limit of not more than 102 whales ‘would be consistent with the requirements of the Schedule’.¹⁷³²

At IWC 54, also, St Vincent and the Grenadines had announced at the Scientific Committee that it would be seeking an increased quota (from two takes to four) of North Atlantic humpback whales; this quota being for its historical Bequian humpback fishery. However, various countries had objected. Some Parties objected that the hunt was not truly aboriginal, but in fact colonial in origin; however, it was pointed out that this objection had not been made when the quota was first given in 1982. Other countries argued for a ‘precautionary approach’ to be taken; and there was dispute over whether the stock was more secure, or not, than the bowhead whale stock.¹⁷³³

The US asked for renewal of its Aboriginal Subsistence Quota of bowhead whales, as before. In other words, the US asked for 280 whales landed, over a five year period, with an annual strike limit of 67 and a carryover of up to 15 strikes in each year - this quota being ‘shared between the Alaskan Eskimos and the Chukotka Communities in Russia’. The Russian Federation requested five landed whales per year over the five-year period.¹⁷³⁴ Japan then ‘commended the success of the 2001 stock abundance estimate’, which had been undertaken under ‘harsh environmental conditions’. Japan then noted that ‘although dozens of whales had been harvested’ the stock had been proved to be increasing; and that this demonstrated that ‘whale resources can be used sustainably’.¹⁷³⁵

When the US put forward its proposal for a five-year quota, Japan ‘remarked that the US recognises the needs of its Alaskan Eskimos and asked whether the US could understand that the Japanese small-type coastal whalers also have needs’. Japan then remarked that it considered the bowhead stock ‘to be in a very dangerous situation’; and suggested that it was not in favour of approving a 5-year period quota. The US responded that it considered the Japanese question regarding Japanese coastal whaling to be ‘out of order’ as this issue ‘would be addressed under another agenda item’. The US responded also that it did not consider the stock to be ‘in a dangerous situation’ as the most recent census had given the largest ever abundance estimate.¹⁷³⁶ Norway then suggested that it would be ‘wise to adopt a slightly more precautionary approach’; and proposed that a catch limit be set for two years, rather than for

¹⁷³¹ *Ibid* at 15.

¹⁷³² *Ibid* at 15.

¹⁷³³ *Ibid* at 18.

¹⁷³⁴ *Ibid* at 15-16.

¹⁷³⁵ *Ibid* at 16.

¹⁷³⁶ *Ibid* at 19.

five, with no more than 112 bowheads to be taken in this period. Neither the US nor the Russian Federation agreed. Oman, Denmark and the Netherlands supported the original US/Russian proposal.¹⁷³⁷

After argument, no consensus was possible. There was then argument as to the correct way to proceed in voting on an amendment. On a vote on Norway's proposal; there were 14 votes in favour, 27 against and three abstentions. Japan was one of those who abstained; explaining that although it would be preferable to set a catch limit for two years rather than for five, it was still doubtful whether this was 'scientifically optimal'. The Chair (from Sweden) then asked whether the original US/Russian proposal could be adopted by consensus, but Japan indicated that this 'would not be possible'; the Chair then asked for a private Commissioners' meeting to be held. After several hours in private meeting, the Chair announced that an agreement had been reached and that the US/Russian proposal could be adopted by consensus; this agreement was confirmed by both Denmark and Mexico. Japan, however, denied the alleged agreement and insisted that a vote be conducted; Antigua and Barbuda also disputed that an agreement had been reached. The Chair then adjourned the meeting to allow for further negotiations.¹⁷³⁸

The next day, it was clear that there was still no consensus; and the US/Russian proposed Schedule amendment was put to a vote. There were 30 votes in favour, 14 against and one abstention; the votes in favour being short of the required 75% majority. Of the countries which had voted against the proposal; Antigua and Barbuda said that it supported the right of aboriginal peoples to utilise whale resources, but that it objected to 'the discriminatory approach' of the IWC 'regarding which countries are allowed to take whales and which are not'. Mongolia, likewise, explained that it had 'voted against the double standards employed within' the IWC. St Vincent and the Grenadines argued that 'for consensus to be reached, there is a need to ensure equality of treatment'; in particular, that if a five-year block were accepted for one it should be accepted for all. The Solomon Islands spoke also of double standards; arguing that the treatment of the Japanese coastal people, and of St Vincent and the Grenadines, was unfair. St Lucia 'called for the equitable distribution of resources'.¹⁷³⁹

A number of countries, such as Denmark, Oman, the Netherlands and New Zealand, then expressed regret as to the outcome of the vote; and as to the alleged broken agreement. New Zealand 'recalled' that this was the first time 'for many years' that an aboriginal subsistence whaling request 'had been denied'. South Africa's Commissioner 'considered' that the 'only rationale for voting against the proposal' could be that a country either 'did not understand the issue'; or that it was 'willing to sacrifice aboriginal peoples' needs for political gain'.¹⁷⁴⁰ Other countries which expressed regret as to the outcome included Sweden, Spain, Switzerland, Morocco, Peru, Australia, Finland, Germany and Monaco; Norway expressed regret that its earlier suggested amendment had not been used to provide consensus. The Russian Federation stated that it 'considered' that those countries which had made accusations about double standards 'were themselves guilty of applying double standards' on this issue. The United States said that it was disappointed that 'some Contracting Governments' had opposed the Schedule amendment 'because of their dissatisfaction with the US's position on

¹⁷³⁷ *Ibid* at 19.

¹⁷³⁸ *Ibid* at 20.

¹⁷³⁹ *Ibid* at 20.

¹⁷⁴⁰ *Ibid* at 20. South Africa's Commissioner then being Judy Chalmers.

other issues'. Further discussions were then again postponed after the US requested another private Commissioners' meeting.¹⁷⁴¹

On the third day of discussions on the issue, the US and the Russian Federation submitted a 'slightly revised' proposed Schedule amendment; but Japan considered this identical to the earlier proposal, and continued to refuse to support it. Instead, Japan proposed an amendment which would include the addition of a new paragraph permitting the taking of 25 Okhotsk Sea-West Pacific minke whales, in each of the five years under discussion, for Japan's four coastal communities. Australia, supported by the Chair (who then ruled that it could not be done), argued that this amendment was not 'in order' and that aboriginal subsistence whaling and commercial whaling 'could not be linked this way'. The Rep of Palau conceded that these were separate issues; but felt that both concerned 'subsistence whaling' and that the proposal provided a 'procedurally appropriate' compromise, and the 'only way out of a difficult dilemma'. The Chair's ruling was put to a vote and upheld.¹⁷⁴² Antigua and Barbuda argued that Japan had been treated unfairly; as its 'coastal whaling could be classified as an aboriginal take' Japan itself 'regretted' that its proposed amendment had not been accepted; and indicated that it could 'not support a [five]-year block quota over concern for the status of the bowhead stock', although a quota for one to two years 'would have been acceptable' to it. Japan indicated that it would 'now be forced to vote against' the amendment proposed by the US and the Russian Federation.¹⁷⁴³

The trouble with Japan's argument as seen in its proposed amendment, of course, is that logically its concern for the bowhead whale stock status could hardly have been allayed by Japan's being granted a take of 25 minke whales from the West Pacific.

The US/Russian proposed Schedule amendment was then put to a vote; at which it received 32 votes in favour, 11 against and two abstentions. The amendment therefore did not receive the necessary 75%, and failed. The Russian Federation then 'noted that the political games that had been played had made people forget the aboriginal peoples and their needs'.¹⁷⁴⁴ This criticism is trenchant; however, the charge remains open that the Japanese coastal communities are victims of similar 'political games' and that the Russian Federation, and others, are guilty of hypocrisy. Mongolia, Dominica and Antigua and Barbuda had voted against the US/Russian proposal; but all took the opportunity afterwards to explain that it was not aboriginal whaling *per se* that they had voted against. Of the countries that had voted with the US and the Russian Federation, St Vincent and the Grenadines suggested that it supported both the US/Russian request and the Japanese coastal whaling request; and urged the IWC to find a 'way to grant both requests'. New Zealand argued that Japan was attempting to draw 'a moral equivalence between prosperous Japanese coastal towns and isolated Arctic communities'; a link which New Zealand argued does not exist. Denmark stressed the 'need to respect the traditional and subsistence needs' of the high Arctic people. The UK described as 'cant and hypocrisy' the conduct of those who had voted against the US/Russian proposal; and 'wondered what honour was left in the organisation'. Mexico argued that the debate had had

¹⁷⁴¹ *Ibid* at 20-21.

¹⁷⁴² *Ibid* at 21.

¹⁷⁴³ *Ibid* at 21.

¹⁷⁴⁴ *Ibid* at 21-22.

‘nothing to do with the purpose and origins of aboriginal whaling and everything to do with politics’.¹⁷⁴⁵

Something of the desperation of the US delegation after losing the vote, certainly in its allies’ eyes, can perhaps be seen in the fact that, later, when St Vincent and the Grenadines proposed a Schedule amendment to permit it to take up to 20 humpback whales in the ‘five seasons 2002/2003 through 2006/2007;’ the UK ‘proposed to add a further amendment by including the joint US/Russian Federation request for a bowhead quota’. The US, however, indicated that it ‘very much appreciated the thoughtfulness of the UK’; but declined the offer.¹⁷⁴⁶

Japan later in the meeting proposed again, as it had for many years, that the Schedule be amended so that 50 minke whales could be taken for its coastal communities. Japan explained that the moratorium had, in the 15 years it had been in place, ‘disrupted the local marine ecosystem’ in that minke whales had so increased numerically that they are currently ‘depleting fishery resources’ and so causing ‘significant declines in the catches of local small-scale fishermen’ - and thereby ‘inflicting severe damage to the economy, culture and tradition of whaling communities’. The communities’ cultures, said Japan, were suffering badly as a consequence of poverty and emigration.¹⁷⁴⁷ The Russian Federation, perhaps with an eye as to what had transpired earlier at the meeting, supported Japan’s request. Norway argued that Japan’s coastal whaling could be accommodated within the aboriginal subsistence fold, given the cultural aspect of it; but argued that the main issue was the IWC’s failure ‘to act as a responsible management organisation’.¹⁷⁴⁸ South Africa stated that it was ‘dissatisfied’ that Japan’s request had not been resolved, due to delays in completion of the RMS, despite having been repeated so many times; but stated also that it ‘would continue to oppose the request’ as it considered Japan’s ‘small-type coastal whaling to be a commercial activity’.¹⁷⁴⁹ Voted upon, Japan’s proposal received 20 votes in favour, 21 against, and three abstentions, and so was not adopted.¹⁷⁵⁰ After the earlier events of the meeting, Japan could hardly have had any realistic hope that its proposal would be approved; but clearly felt that it ought at least to make the point of calling for a vote.

10.2.3 Reactions to the 2002 Meeting

Ultimately, then, it can be said that early in the 21st Century, indigenous whaling quotas were a battleground on their own. In May 2002, at the 54th annual meeting of the IWC, the proposal for subsistence quotas of bowhead whales for Inuit peoples in the United States and Chukotka peoples in Russia were not approved. The scientific basis for this rejection was revised calculation of quotas which suggested that the quotas should be reduced to zero, and revised annually instead of in five-year periods. The political basis for the rejection was Japan’s insistence that anti-whaling countries were guilty of ‘double-standards’ in rejecting Japan’s coastal whaling, while supporting quotas for bowhead whales.¹⁷⁵¹ The bowhead quota, according to the Japanese media, was opposed by Japan after a Japanese request that four

¹⁷⁴⁵ *Ibid* at 22.

¹⁷⁴⁶ *Ibid* at 24.

¹⁷⁴⁷ *Ibid* at 36.

¹⁷⁴⁸ *Ibid* at 36.

¹⁷⁴⁹ *Ibid* at 36.

¹⁷⁵⁰ *Ibid* at 37.

¹⁷⁵¹ ‘Aboriginal subsistence whaling’ *JWA News* No. 1, July 2002 http://www.whaling.jp/english/news/0207_02.html.

coastal towns be allowed to catch a total of 50 minke whales was rejected.¹⁷⁵² This is not sequentially accurate, given that the vote on the bowhead quota preceded that on Japanese coastal whaling; however, the assessment is probably correct, given the amount of political manoeuvring that appears to have gone on.

According to Masayuki Komatsu,¹⁷⁵³ writing in *ISANA*, until the meeting the proposal by the United States and Russia (for a quota of 280 bowhead whales over a five year period - in this case 2003-2007 - for Inuits in Alaska and aboriginal people in the Chukotka Autonomous District in Russia) had traditionally been 'unconditionally approved'; but that this time it was put to a vote, 'and was denied with the opposition of 14 countries, including Japan'. Although Japan, according to Komatsu, 'gave support, as it did previously, to the needs of aboriginal subsistence whaling as a matter of principle, it asserted that the quota should be requested on a year-to-year basis in view of the current fragile and unknown state of the bowhead population'.¹⁷⁵⁴

This does appear at first glance to have been very clever of the Japanese delegation - they cunningly outmanoeuvred the United States; and, by forcing the United States to call another meeting later that year, successfully exposed US hypocrisy. By, firstly, proposing a compromise amended proposal which would have given Japan a quota for itself and, secondly, voting in October for the US/Russian quota, however, Japan also exposed its *own* hypocrisy. Neither side comes out of the episode with any credit (or credibility) at all.¹⁷⁵⁵

Politics and hypocrisy were in abundance. Burns and Wandesforde-Smith comment that '[t]he bickering [in the IWC] even reached new heights in Shimonoseki when, for the first time ever in the 56-year history of the Commission, votes were forced on the renewal of catch limits for aboriginal subsistence whaling'.¹⁷⁵⁶ 'Despite an effort by Japan's Fisheries Agency to put a good face on it', they write, 'Japan's defeat of a new quota for bowhead whales to be taken by Russian and American indigenous peoples in the Arctic was more widely seen as political retribution for earlier and arguably embarrassing failures of the IWC at Shimonoseki to advance Japan's agenda'. The IWC had apparently, in addition to refusing a quota of minke whales for Japanese coastal whalers, also 'failed to approve Japanese and Swedish proposals for a new whaling management regime, the introduction of which would have allowed the resumption of commercial whaling'.¹⁷⁵⁷

According to McGuinness, Japan 'is finally resisting being pushed around by the whale-huggers of the rest of the world'; and 'in the process [of IWC 54] it exposed the absurdity, indeed the hypocrisy, of the Australian Government's commitment to a South Pacific whale sanctuary'. Japan, he says, 'acted perfectly logically in insisting that if there were to be a ban

¹⁷⁵² 'Japan supports ban on whaling to hit US' *Washington Times* 24 May 2002

<http://asp.washtimes.com/printarticle.asp?action=print&ArticleID=20020524-18964536> (accessed 28 May 2002).

¹⁷⁵³ Director, Resources and Environment Research Division Fisheries Agency of Japan and Alternate Commissioner of the Government of Japan to the International Whaling Commission.

¹⁷⁵⁴ M Komatsu 'What Was Achieved at the Shimonoseki IWC Meeting' *ISANA* No.26, December 2002 www.whaling.jp/english/isana/no26_01.html.

¹⁷⁵⁵ I have been told, off the record, that it appears that Komatsu may have acted without authority on this move; and that he may since have accordingly lost some influence within the Japanese delegation. See (n 1593).

¹⁷⁵⁶ It is uncertain what the authors mean here, given the controversy of 1977. See [3.2.6](#), [3.2.7](#) and [3.2.8](#).

¹⁷⁵⁷ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 199.

on whaling it should apply equally to those who, in the name of some special sacred right of indigenous peoples, had been exempted from the general ban'; especially as 'their protein needs can be perfectly adequately supplied in other ways - they simply do not depend for their survival on eating whales'. If the claim is based on tradition, he says, 'then Japan has an equally valid claim to hunt and eat whales on a traditional basis'.¹⁷⁵⁸

Writing in *ISANA* in December 2002, Takao Hosokawa suggests that 'the United States [has] globalized information through its powerful information transmission capability. In other words, it spread in the world the American tenet that unregulated free economy is good'. There may be, he says, 'diverse interpretations of the word globalism, but the point here is that globalism entails the imposition of value systems. It implies that countries and regions having their own traditional rules and customs should abandon them and comply with the global rules. The autonomy of whaling rooted in regions, it seems to me, has been utterly deprived under the pretext of environmentalism, which is a form of globalism'.¹⁷⁵⁹ He then argues that the 'present trend toward globalism' represents the unilateral 'imposition of rules and value judgments' by the US. A commercial whaling moratorium is in place and 'the right of livelihood by traditional whaling communities has been infringed upon' by environmental globalism that 'has made the whale a symbol of environmental protection under the slogan' that 'the earth's environment cannot be preserved if we cannot protect whales'. This situation, he argues, 'clearly represents the negative aspect of globalism'; and 'Japan needs to fight back the US-led universalism' under the name of 'globalism' that 'denies regional traditions and customs'. There is indeed, he concludes, 'a need to correct the present abnormal situation of the IWC - an international framework for whaling dominated by environmental globalism that gives little regard to the will of whaling communities'.¹⁷⁶⁰

Ironic then, the United States-led preservationist philosophy. Is Western environmentalism imperialism? Can whaling be seen as a symbol of resistance to globalisation and United States hegemony? This is an intriguing idea, given the perceived usual linkage of anti-globalisation supporters and environmental activists; and the usual (Western) perception of Japan as a self-interested, industrial country with little environmental concern.

Per Friedheim, '[u]ntil it is clear that the whaling opponents are interested in an integrative outcome, pro-whaling states and coalitions should act strategically'; and '[s]trategic behaviour calls for judging the issue on whether a positive vote will further your goals regardless of merit'. So, he argues, 'if the United States proposes a quota for its Alaskan native whalers, strategically your vote would depend upon what promises or actions the US makes in relation to issues highly salient to you. Your vote need not even be tied to a specific issue'.¹⁷⁶¹

¹⁷⁵⁸ P P McGuinness 'Whale-Huggers' Case is Up the Spout' *Sydney Morning Herald* 28 May 2002 in *ISANA* No.26, December 2002 www.whaling.jp/english/isana/no26_03.html.

¹⁷⁵⁹ T Hosokawa 'Globalism and the Whaling Issue' *ISANA* No.26, December 2002 www.whaling.jp/english/isana/no26_04.html. Takao Hosakawa is a professor in the Agriculture Department of Ehime University.

¹⁷⁶⁰ *Ibid.* Hosokawa argues that ... 'we want that coastal whaling in Japan will be treated in the same way as subsistence whaling by Inuits in the United States. We want the IWC to recognise a provisional quota of 50 minke whales in order to bring relief to whaling in our region'. *Ibid.*

¹⁷⁶¹ R L Friedheim 'Negotiating in the IWC Environment' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 222.

10.2.4 The 2002 intersessional Meeting

In October 2002 an intersessional meeting of the IWC was held - the main item on the agenda being an amendment proposed jointly by the governments of the US and the Russian Federation in respect of aboriginal subsistence hunting of bowhead whales. By consensus, the delegates to the IWC approved the proposal so as to allow up to 280 bowhead whales to be landed in the period 2003 through 2007, with no more than 67 whales to be struck in any given year. An annual average of 51 bowheads for the US and 5 for Russia was approved.¹⁷⁶²

What *is* the current bowhead population? If only 8 000-10 000 as is generally estimated,¹⁷⁶³ then roughly 50 per annum is arguably a substantial take. Certainly, this must be considered worse for the species as a whole than is the taking of a few hundred minke whales per annum.

Japan did not block consensus on the US/Russian proposal;¹⁷⁶⁴ and, in a clear *quid pro quo*, those two states in turn voted in favour of Japan's attempt to gain approval for coastal whaling. The Japanese proposal did not, however, gain sufficient support from other delegates to be adopted.¹⁷⁶⁵

Questioned on the 2002 meeting, Herman Oosthuizen said that his understanding of what had happened was that, while there appeared to be more contact between the US and Japan's Department of Foreign Affairs, the events of 2002 had been driven more by Japan's Department of Fisheries. He was present, and said that it was covered intensely by the media, which mainly focused on the US and Japanese delegations. There was much negotiation in private commissioners' meetings, and behind the scenes, to try to break this impasse.¹⁷⁶⁶ Oosthuizen implied also that it was to become apparent that the meeting was something of a watershed for the US - 'their position before and after that meeting has changed to become more moderate'.¹⁷⁶⁷

10.3 After Shimonoseki

10.3.1 IWC 55, 2003

At IWC 55 in 2003, there was little debate on the issue of aboriginal subsistence whaling. It was reported by the Scientific Committee, in regard to the Bering-Chukchi-Beaufort Seas stock of bowhead whales, that it had received 'a new population estimate for 2001 of around 10 000 whales and a rate increase of 3.4% for the period 1978-2001'; and that there was, therefore, 'no reason to change its previous management advice'.¹⁷⁶⁸ Commenting on the

¹⁷⁶² *Enviro News Service* (14 October 2002) <http://ens-news.com/ens/oct2002/2002-10-14-03.asp>.

¹⁷⁶³ According to the Worldwide Fund for Nature (WWF) in early 2007 there were approximately 10 000 individual animals. See 'Bowhead whale: Population & Distribution' *WWF* 13 February 2007 http://www.panda.org/about_wwf/what_we_do/species/about_species/species_factsheets/cetaceans/right_whales/bowhead_whale/bwhale_population_distribution/index.cfm (accessed 2 June 2008).

¹⁷⁶⁴ IWC 'Chairman's Report of the 5th Special Meeting' (14 October 2002, Cambridge) in G P Donovan (ed) *IWC Annual Report of the International Whaling Commission 2003: Covering the 2002-2003 Financial Year and the 55th Annual Meeting held in Berlin in 2003* (2004) 138 at 143. See 3.3.10.

¹⁷⁶⁵ *Ibid* at 144-45. See also *Enviro News Service* (14 October 2002) <http://ens-news.com/ens/oct2002/2002-10-14-03.asp>.

¹⁷⁶⁶ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

¹⁷⁶⁷ *Ibid*. See 17.1.

¹⁷⁶⁸ IWC 'Chairman's Report of the Fifty-Fifth Annual Meeting' (16-19 June 2003, Berlin) at 13.

bowhead issue, Japan and Norway, however, called again for ‘consistency in methods for both commercial and aboriginal subsistence whaling’.¹⁷⁶⁹

Japan, however, noted that, in the sixteen years since the moratorium on commercial whaling, it had continually requested ‘an interim relief allocation of 50 minke whales’ for its four coastal communities. According to Japan, ‘whale abundance has increased, while its coastal fisheries have become impoverished, leading to considerable discontent among fishermen over the competition between fisheries and whales’. Japan now suggested that it had decided to change its approach. Its new approach would be to promote ‘community-based whaling’; with all edible parts of each whale to be used as food, and a substantive part of this to be distributed primarily among the four local communities and neighbouring areas - including the area of Kushiro, where a ‘land station’ would be built. This approach would, Japan argued, promote local industries, stimulate distribution of whale products and tourism, and ‘reinstate traditional products associated with sales of whale meat and revitalize traditional festivals and rituals of the regions’.¹⁷⁷⁰

Sweden, however, countered that the proposal would contravene the moratorium; and that any future catch limits must be agreed to under the RMS. Monaco argued that the proposal, if accepted, would ‘effectively open a new category of whaling’. The UK queried why Japan was asking for 200 minke whales per year, instead of the 50 it had traditionally asked for as an interim relief measure; especially as Japan’s coastal communities were already harvesting ‘other cetaceans such as Baird’s beaked whale’. The US said that it considered the proposal to be ‘for commercial whaling’. Switzerland, Germany and Mexico also opposed the proposal. Denmark noted that in the past it had ‘supported Japan’s request for an interim relief allocation of 50 minke whales’; but considered the present proposal to be very different, in that it was for a five-year period instead of only for one year, and that it was for a 200% increase in the number of whales to be taken. Denmark indicated that it could not support the proposal. The Rep of Korea ‘insisted’ that ‘small-type coastal whaling’ should be based on scientific advice; and should not begin until after the RMS had been completed.¹⁷⁷¹ On the other hand, Japan’s proposal was supported by Norway, Iceland, Antigua and Barbuda, Dominica, the Solomon Islands, the Rep of Guinea, Benin and the Russian Federation. Norway argued that Japan’s proposal ‘could be considered as a way of accommodating the legitimate needs of the coastal communities’ and not as a new category of whaling. Iceland argued that there are ‘only two types of whaling, sustainable and non-sustainable’; and that, as this proposal was for sustainable whaling, Iceland supported it. The Russian Federation supported the proposal as having a ‘sound scientific basis’; and because it ‘complied’ with principles of sustainable use, while acknowledging the ‘traditional needs of the community’.¹⁷⁷² It is interesting that the Russian Federation continued to support the proposal, in the spirit of the intersessional meeting of October 2002; but that the US reverted to its longstanding position that Japanese coastal whaling could not be seen as aboriginal subsistence whaling.¹⁷⁷³ On being voted on, the proposed Schedule amendment received 19 votes for, 26 against and one abstention.¹⁷⁷⁴

¹⁷⁶⁹ *Ibid* at 14.

¹⁷⁷⁰ *Ibid* at 27-28.

¹⁷⁷¹ *Ibid* at 28.

¹⁷⁷² *Ibid* at 28.

¹⁷⁷³ *Ibid* at 28.

¹⁷⁷⁴ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 29.

10.3.2 IWC 56, 2004

In its written Opening Statement at IWC 56 in 2004, Japan appealed for ‘support for our proposals for the sustainable utilization of abundant minke and Bryde’s whales with scientifically calculated harvest limits and an adequate enforcement and monitoring scheme’. Japan suggested that this would ‘demonstrate Japan’s ability to regulate whaling and to implement inspection and observation measures in a transparent manner similar to that envisioned under an RMS’.¹⁷⁷⁵

At IWC 56 in 2004, on aboriginal subsistence whaling, it was noted that the differences between the relatively ‘easy’ data-rich cases of the bowhead and gray whales and the data-poor Greenlandic cases, might ‘warrant a different approach to the examination of the trade-off between risk and need satisfaction’. The catch data for 2003 were six landed fin whales (two males, four females), with three fin whales struck and lost; 178 landed West Greenland common minke (58 males, 117 females, 3 unknown), with seven struck and lost; 13 landed East Greenland common minke whales (one male, 11 females, 1 unknown). New Zealand stated that it considered the data provision by Greenland to be unsatisfactory; and questioned whether restrictions should be imposed on its catch quotas. Denmark said it was trying to improve communication with hunters. The UK felt that non-compliance with conditions required more serious action; and also urged Greenland to carry on its research programme and to try to address the sex bias in catches.¹⁷⁷⁶

Attempts were, it was divulged, ongoing to develop SLAs (‘strike limit algorithms’) for Greenland. Japan commented on the different approaches being used to develop SLAs for aboriginal subsistence whaling (being stock-specific) compared with that for the RMP (being generic); noting that, if applied to the Bering-Chukchi-Beaufort Seas stock of bowheads, the RMP would not give a catch limit. Japan explained that it did not believe these different approaches to be scientifically justified and considered that double standards were being applied. In response, the US noted that the approaches to the SLA and CLA are different because the Commission has given different policy advice for the different types of hunt. The US considered it inappropriate to apply the CLA to a stock subject to subsistence whaling. It further noted that the Scientific Committee has indicated that the bowhead SLA will have to be reviewed if new information on stock identity comes to light.¹⁷⁷⁷

In its written Opening Statement at IWC 56, the United States recorded that ‘it [was] in the 27th year of the research program it committed to undertake in 1977 to provide for the science-based management of the Bering-Chukchi-Beaufort Seas stock of bowhead whales’; and that the US was ‘pleased’ with the in-depth assessment undertaken by the Scientific Committee on bowhead stock status.¹⁷⁷⁸

¹⁷⁷⁵ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ (19-22 July 2004, Sorrento); written Opening Statement by: Japan (IWC/56/OS/JAP).

¹⁷⁷⁶ ‘Chair’s Report of the 56th Annual Meeting’, 19-22 July 2004, Sorrento, Italy at 18-21; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

¹⁷⁷⁷ *Ibid* at 24

¹⁷⁷⁸ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ (19-22 July 2004, Sorrento); written Opening Statement by: US (IWC/56/OS/USA).

It was agreed that there would be no change to the current bowhead block quota for 2003-2007. The US and the Russian Federation commented on planned co-operative research - so that when the bowhead quota would next be reviewed, in 2007, management of the stock would be based upon the best science available at that time. The Russian Federation noted its intent to engage in as much joint research as is possible, although it noted that CITES sample requirements may impose difficulties on what is possible. In this respect, Switzerland drew attention to a Resolution adopted at COP 12 of CITES in Santiago (Chile), aimed at facilitating transboundary movement of sensitive biological samples such as scientific research materials for conservation purposes.¹⁷⁷⁹

10.3.3 Double standards

Japan 'expressed appreciation for the active discussion in the Scientific Committee' and explained that it believed that 'the results from work on this stock should be reflected in management advice from this year onwards'. As it has the previous year, it noted what it believed to be 'double standards in the approach to management of the bowhead stock using the *SLA* and the *Implementation Simulation Trials* on western North Pacific minke whales using the *CLA*'; and Japan then called for 'consistency in approach'.¹⁷⁸⁰

According to the Chair, 'St Vincent and the Grenadines indicated that it was unfortunate that it had been unable to attend the Scientific Committee and the Aboriginal Subsistence Whaling Sub-committee meetings'; and 'confirmed that it had submitted a copy of its 2003 whaling regulations to the Secretariat', and reported that on 29 March 2003 one humpback whale, 39ft in length, had been taken'.¹⁷⁸¹

At IWC 55, a small group (Russia, Denmark, Australia, the US, and the Secretariat) was charged with review of Schedule paragraph 13, which provides for aboriginal subsistence whaling catch limits, to determine consistency. The group agreed that the words 'when the meat and products of such whales are to be used exclusively for local consumption' means that some transaction beyond the aboriginal whaling communities under the current Schedule language are acceptable.¹⁷⁸² It was agreed by the Small Group that aboriginal communities in Chukotka, which have quotas to take gray and bowhead whales, have equal rights to other aboriginal communities that have Aboriginal Subsistence Whaling quota to use the meat and products of these whale species. The Russian Federation then proposed an amendment - the effect of which would essentially be to allow the striking/taking of bowhead/gray whales

¹⁷⁷⁹ 'Chair's Report of the 56th Annual Meeting', 19-22 July 2004, Sorrento, Italy at 21-22; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

¹⁷⁸⁰ *Ibid* at 24.

¹⁷⁸¹ *Ibid* at 24.

¹⁷⁸² *Ibid* at 24-28. It was reported that '[t]he definition of aboriginal 'subsistence use' was adopted by the Cultural Anthropology panel of the IWC Meeting of Experts on Aboriginal/Subsistence Whaling in February 1979 (reported in *IWC Special Edition 4*, 1982) and provided that: (1) The personal consumption of whale products for food, fuel, shelter, clothing, tools or transportation by participants in the whale harvest. (2) The barter, trade or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations other than the local community with whom local residents share familial, social, cultural or economic ties. A generalized currency is involved in this barter and trade, but the predominant portion of the products from such whales are ordinarily directly consumed or utilized in their harvested form within the local community. (3) The making and selling of handicraft articles from whale products, when the whale is harvested for the purposes defined in (1) and (2) above. ...'. *Ibid* at 24-28.

accompanied by calves. The Commission eventually adopted both the report of the Small Group and the revised proposed Schedule amendment by consensus.¹⁷⁸³

10.3.4 IWC 57, 2005

On Day 3 of IWC 57 in 2005, the primary item of business was discussion of matters related to aboriginal subsistence whaling. The Commission agreed that no changes were needed to catch limits presently in force.¹⁷⁸⁴

10.4 Cultural arguments

10.4.1 Politics and indigenous whaling organisations

Global awareness, it appears, is increasing amongst repositories of indigenous, or at least local, knowledge. It has been contended, by Friedheim, that the pro-whaling coalition ‘has been supported by increasing numbers of NGOs in recent years’; amongst which, he says, are the Japan Whaling Association, Japan Small-Type Whaling Association, World Council of Whalers, High North Alliance, International Wildlife Management Consortium, Inuit Circumpolar Conference, the European Bureau for Conservation and Development, and the Norwegian Whaler’s Union.¹⁷⁸⁵

Schiffman writes that the World Council of Whalers (WCW) is a non-governmental organization with the overarching objective of providing ‘a forum for whaling peoples around the world, both aboriginal and non-aboriginal’; and having as its mission the promotion of ‘their continued sustainable use of marine living resources, to protect their cultural, social, economic and dietary rights, and to address their concerns’.¹⁷⁸⁶ Komatsu and Misaki write, of a gathering of traditional whalers, which produced the ‘Nagato Declaration on Traditional Whaling’, that ‘[o]n March 21, 2002, many people from traditional whaling communities in Japan gathered in Nagato City, Yamaguchi Prefecture for a Traditional Whaling Communities’ Summit’. They advise that an important declaration is that ‘[s]ustainable use of natural resource[s], including whaling, should be promoted and unity with people of the world

¹⁷⁸³ *Ibid* at 24-28.

¹⁷⁸⁴ ‘IWC Plenary Meeting - Day 3’ 20 June 2005 <http://iwcoffice.org/meetings/meeting2005.htm> (accessed 25 May 2006). These catch limits being: Bering-Chukchi-Beaufort Seas bowhead whales, Alaskan Eskimos and native Chukotka peoples - 280 whales in period 2003-2007, no more than 67 whales in a year, 15 unused strikes carryable each year. Eastern North Pacific gray whales, those whose “traditional, aboriginal and subsistence needs have been recognised” - 620 whales for period 2003-2007, max 140 in any one year. Humpback whales, Bequians of St Vincent and the Grenadines - not more than 20 2003-2007, products to be used for local consumption only. East Greenland minke whales, Greenlanders - annual catch of 12 whales, 2003-2007. West Greenland fin whales, Greenlanders - annual catch of 19 whales, 2003-2007. West Greenland common minke whales, Greenlanders - up to 175 annual strikes, 2003-2007, up to 15 unused strikes carryable. ... In a highly unusual move, it was reported then that the Home Rule Government of Greenland, through Denmark, voluntarily agreed to reduce [its] quota of fin whales to [ten]’. The reduction from 19 to 10 to be for each of the years 2006 and 2007. Chair’s Summary Report for the 57th Annual Meeting Korea, June 2005 at 2; http://www.iwcoffice.org/_documents/meetings/ChairSummaryReportIWC57.pdf (accessed 25 May 2006).

¹⁷⁸⁵ *Ibid* at 15.

¹⁷⁸⁶ H S Schiffman ‘The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 159 at 162-63; and see <http://www.worldcouncilofwhalers.com>.

who rely on utilization of wildlife strengthened'.¹⁷⁸⁷ This point (number 6 in the Declaration) is important for the linkage of whaling with general sustainable use.

Stone adds to this argument for the greater importance of the whaling debate, suggesting that '[t]he whaling debate has become a forum for defining and acting out a wide range of important social and ethical issues that have little to do with whales or whaling as such'; and that '[w]haling is not just about whaling; it is about the right to choose, or at least not to be dominated'.¹⁷⁸⁸

Friedheim writes that at CITES COP 10 there was 'a strenuous effort to remove whales and elephants from a listing that declared them endangered'; an effort that 'succeeded in the case of elephants and almost did in the case of whales, with a majority in favor (57-51) but not the two-thirds majority necessary to pass'. Some observers, he says, 'claim that the tide is turning albeit slowly not only in CITES but also the IWC'; and that 'they can foresee the day when a ban on all but indigenous whaling will be lifted, and when indigenous whalers will be treated reasonably'.¹⁷⁸⁹

Again, this provides important linkage of the two treaties - and of issues common to both, and relevant to conservation more generally.

Freeman adds that '[a] fundamental difference exists between the earlier historic period of excessive industrial whaling and contemporary or recent community-based whaling'.¹⁷⁹⁰ By comparison to early - and largely uncontrolled - commercial whaling, of course, the numbers of whales taken by aboriginal hunters hardly seem significant.

¹⁷⁸⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 68-69. Per Komatsu & Misaki, the Nagato Declaration on Traditional Whaling reads as follows:

On March 21, 2002, many people from traditional whaling communities in Japan gathered in Nagato City, Yamaguchi Prefecture for a Traditional Whaling Communities' Summit. ... SERIOUSLY CONCERNED that the [IWC] has been prohibiting catching of large whales that not only ended Antarctic whaling but also suspended coastal small type whaling which has caused adverse effects on local communities and regional economies; RECOGNIZING that conservation of whale resources and their sustainable use should be realized as well as the importance of marine stewardship and the need to continuously protect the oceanic environment; AFFIRMING that sustainable whaling should be revived, protecting and perpetuating the proud whaling heritage inherited from previous generations; ... ENDORSES AND AFFIRMS: 1. The basis of Japanese whaling tradition and culture, characterized by the total utilization of whales and a spirit of gratitude, should be maintained and perpetuated. 2. Western style commercial whaling that produced only oil and wasted resources on a massive scale should not be repeated. 3. Local food resources, including whale products, that have been utilized over generations should be appreciated and such valuable resources should be fully utilized and the traditions passed on to future generations. 4. Institutionalization of a system to effectively utilize beached whales which are valuable gifts from the sea, as food and for other purposes should be implemented. 5. Whalers who engage in sustainable whaling in many places of the world should be appreciated and their vocational rights and occupational pride should be respected. 6. Sustainable use of natural resource[s], including whaling, should be promoted and unity with people of the world who rely on utilization of wildlife strengthened. 7. The history of whale utilization developed along with human communities. Coastal whaling that inherited whaling traditions from our ancestors shall be recommenced as sustainable whaling so that it can make a contribution to regional cultures and economies as well as to the total utilization of the marine ecosystem. 8. Younger generations will do their best for whale conservation and the sustainable use of whale resources as well as perpetuating the inherited whaling culture and tradition for future generations.

Ibid at 68-69.

¹⁷⁸⁸ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 279-80.

¹⁷⁸⁹ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 37.

¹⁷⁹⁰ M M R Freeman 'Is Money the Root of the Problem? Cultural Conflicts in the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 123 at 138-39.

10.4.9 The Untied States

The United States did not manage to put its aboriginal whaling issue to bed for good in the late-1970s and early 1980s. Not only was great damage done at the time to the country's reputation, but the controversy has flared again. Friedheim argues, for instance, that the US is 'seriously pressured from both sides of the issue. It has within its voting public large lobbying organizations with a commitment to end whaling and a pro-whaling community and state delegation (Alaska) that insists that the United States accommodate their needs'.¹⁷⁹¹ Unfortunately, he explains, the US 'has a long record of establishing a principle and then either seeking exceptions to the principle for itself and its citizens or ignoring the substance of the principle when it does not suit it'.¹⁷⁹² This contention certainly appears to be borne out by the American experience of aboriginal subsistence whaling since the 1970s.

10.4.3 The 2003 Meeting and on

The 55th meeting of the IWC (Berlin, June 2003) set quotas to run from 2003: until 2007, up to 280 bowhead whales may be taken by Alaskan eskimos and by the Chukotka people; and up to 20 humpback whales by the Bequian people of St Vincent and the Grenadines. Until 2006, 620 Eastern North Pacific gray whales may be taken for 'traditional, aboriginal and subsistence needs;' while Greenlanders may take 19 West Greenland fin whales annually, 175 West Greenland minke whales annually, and 12 East Greenland minke whales annually.¹⁷⁹³

10.4.4 The future

In international law, Japan would appear to have a reasonable case for the resumption of coastal whaling.¹⁷⁹⁴ Accusations have, however, been (and will doubtless continue to be) made that Japan is being disingenuous in seeking to equate its coastal whaling proposals with aboriginal whaling - the former having a profit motive, the latter being based on subsistence only.¹⁷⁹⁵ Further, it needs to be pointed out strongly that the communities for which Japan is claiming an 'interim relief allocation' continue to take considerable numbers of cetaceans annually - using species which are not managed by the IWC, such as Baird's beaked whale and Dall's porpoise.¹⁷⁹⁶ Increasingly, however, the distinction between commercial whaling and ASW appears an artificial one designed to suit the interests of the anti-whaling bloc. It was therefore to be expected that, with the US/Russian Federation aboriginal subsistence whaling quota expiring, aboriginal whaling would be the issue that dominated the 2007 Meeting, in Alaska - IWC 59.¹⁷⁹⁷

¹⁷⁹¹ R L Friedheim 'Negotiating in the IWC Environment' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 225.

¹⁷⁹² *Ibid* at 225.

¹⁷⁹³ Final Press Release, IWC 55. Berlin, 16-19 June 2003 <http://www.iwcoffice.org/FinalPressRelease2003.html>.

¹⁷⁹⁴ Norway's coastal whaling is legally unassailable, given that Norway has a reservation to the moratorium.

¹⁷⁹⁵ Enviro News Service (14 October 2002) <http://ens-news.com/ens/oct2002/2002-10-14-03.asp>. See also www.whales.greenpeace.org (24 May 2002).

¹⁷⁹⁶ See 2.2.5, (n 1678) and (n 1823) on the numbers of porpoises killed annually.

¹⁷⁹⁷ See 3.3.25 to 3.3.34.

11 Sovereignty and environmental destruction

11.1 Sovereignty

11.1.1 *National sovereignty*

According to Sands '[t]here is no rule of international law which requires a state to become a party to a treaty. Sovereignty means any country is free to decide whether to ratify ... any [] international instrument'; and a 'decision not to ratify does not necessarily reflect a lack of commitment to international law'. As an example, he gives the fact that 'the United States has not joined the Law of the Sea Convention, but has gone out of its way to follow the rules it lays down'.¹⁷⁹⁸

Schiffman writes that '[t]here is strong support for the concept of national sovereignty over national resources'; and that 'in the case of marine resources, the concept of national sovereignty is recognized in the 1982 [UNCLOS]' where the 'regime of the EEZ subjects large segments of the ocean to national jurisdiction where prescriptive and enforcement jurisdiction is the strongest. For example, Article 61 of UNCLOS provides that the coastal state shall determine the allowable catch of the living resources in its EEZ'.¹⁷⁹⁹

11.1.2 *Issues that transcend national sovereignty*

It can, however, be argued strongly that there are certain issues which must transcend national sovereignty, being of extreme importance to the global community. The protection of biodiversity in rainforests, overfishing of the oceans, and the future of important species such as the elephant and the rhinoceros must be leading examples of these.

Strangely, however, a state might be adamant in its stance on a particular international issue in order to gain certain short-term advantages; even if it does not really believe in its own professed stance. Lapointe argues that 'very few politicians and officials, if any, will show enough courage to educate their constituents on the whale issue'; and suggests that such functionaries have 'virtually no incentive to make a principled stand' because whaling is not something that is of great importance for their people, economic interests, or sovereignty.¹⁸⁰⁰

Vogler writes that there are, obviously, 'extreme differences of scale between local and global commons'; but that it can nonetheless, 'be argued that the similarities are more than merely metaphorical' and that '[s]imilar problems and institutional principles can be found at both levels, along with some of the same arguments about governance'.¹⁸⁰¹ In most instances of the commons, he says, 'what matters is not the inherent characteristics if the good but the property rules that are applied to it'; and that '[s]uch rules constitute changeable human

¹⁷⁹⁸ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 70.

¹⁷⁹⁹ H S Schiffman 'The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 159 at 169-70. Ultimately, he says, 'the legality of states' actions with regard to the exploitation of their own marine resources may be presumed absent a treaty limitation to the contrary or clear evidence that such exploitation is interfering with the rights of other states'; but that '[w]hether or not a particular case of utilization contravenes conservation objectives is another question'. *Ibid* at 170-71.

¹⁸⁰⁰ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 92.

¹⁸⁰¹ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 2.

institutions and in consequence mobile goods, such as fish, become different types of property depending on their specific location in relation to these institutions'.¹⁸⁰²

It seems that at the opening session of the IWC in Washington DC on 20 November 1946 the US Secretary of State, Dean Acheson, said that 'whales ... belong to no single nation nor to any group of nations but rather they are the wards of the entire world'.¹⁸⁰³ Of course, in context this was probably intended largely in a utilisation sense - despite the apparently protective word 'wards'.

At IWC 25 in 1973 the United States Commissioner said that 'whales come under no nation's exclusive national jurisdiction, and as such have to be an international trust in whose disposition all nations should have a voice'. He then added that he did not think that 'the world any longer tolerates the view that only the nation or the industry which is in a position to exploit a marine resource should have full and final responsibility for it'.¹⁸⁰⁴

Similar sentiments can be found in the Opening Statement to IWC 33, 1980, by the Commissioner for St Lucia, who suggested that '[w]e consider the oceans and all their flora, fauna and mineral resources as mankind's common inheritance'; and that '[p]erhaps the time is also opportune for St Lucia to propose that the IWC become an affiliate of the United Nations under its Charter, and that discussion on the Law of the Sea and the delineation of the sea boundaries make reference to the whale as the common inheritance of mankind'.¹⁸⁰⁵

11.1.3 High seas and EEZs

Vogler suggests that, early on, 'consumption of the common pool resources of the oceans was rival but non-excludable'; and that by the 1970s both fish and whales 'were subject to a degree of exploitation that placed the survival of many species in doubt'. However, high seas fisheries retained a '*res nullius*' status 'alongside regional attempts to create CPRs under the various Fishery Commissions'. Whales have since 1946, he argues, 'been very ineffectually (at least until the 1980s) treated as a global CPR - the focus of much environmental activism and public interest'.¹⁸⁰⁶

Rose and Paleokrassis write that '90 percent of known fisheries are enclosed' within 200-nautical mile zones; and that, thus, 'only ten percent of fisheries are now to be found in the high seas and constitute part of the international commons'. Those fisheries which are located in the 200-mile zone are, they say, 'subject to the exclusive economic rights of the coastal state over them' and 'are not part of the international commons and their management is a domestic matter for the coastal state to arrange'; this being 'a task for which the coastal state is not accountable beyond its own domestic political processes'. As whales, they argue, are migratory species and may be found in different coastal waters or on the high seas, whales are often considered part of the international commons without their ever being 'subject to

¹⁸⁰² *Ibid* at 3.

¹⁸⁰³ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 58, fn 21. See (n 143).

¹⁸⁰⁴ Dr R White, USA, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* at 23-24.

¹⁸⁰⁵ St Lucia Commissioner, IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton)

IWC/33/OS/STL at 1-2.

¹⁸⁰⁶ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 6-7.

national jurisdiction'. However, they suggest stressing the importance of international cooperation in the proper management of whales.¹⁸⁰⁷

This arguably implies that UNCLOS is subject to the ICRW, which covers a species/genus and not an area. Certainly, as will be seen,¹⁸⁰⁸ UNCLOS has arguably recognised the IWC as *the* management authority for cetaceans.

'[R]ecent international approaches to species conservation', argues Ong, 'address a wider range of issues than CITES and primarily focus on habitat protection', despite 'the constraints' that the 'territorial imperative' of national sovereignty imposes on 'these new regulatory regimes'.¹⁸⁰⁹ Probably, the CBD is being referred to; and it can be seen as intruding on sovereignty.

On the other hand, Nollkaemper suggests that '[w]ith a seemingly schizophrenic persistence, states simultaneously pursue policies to protect forests, animals, and ecosystems located in the territory of other countries on the one hand'; and, on the other, to 'support a legal system that protects states' sovereign rights to determine for themselves whether or not to protect such values'.¹⁸¹⁰

It has, though, been suggested that even were it ever true that only the view, or 'writ' of a nation-state could run within its borders, that view can hardly be true today in current international life. This is because it has been demonstrated clearly, by the process of globalization, per Friedheim, that states have great trouble controlling transnational business, pollution, and communications and ideas within their borders.¹⁸¹¹

11.1.4 Stretching the boundaries of sovereignty

It can be asked, in the face of globalisation, how true the sovereignty idea can really be in the 21st Century. Vogler, however, points out that '[d]espite various assaults on their competence nation states remain legally pre-eminent in the world system and it is therefore unsurprising that they should be the parties to global commons agreements'. The concern that can be expressed, however, is that 'they cannot be expected to rise above their own short-term national and electoral concerns' and '[e]cology becomes the plaything of *realpolitik*'. He then quotes Sachs as saying, in 1993, that 'the rhetoric, which ornaments conferences and conventions, ritually calls for a new global ethic but the reality at the negotiating table suggests a different logic'; and there, 'for the most part, one sees diplomats engaged in a familiar game of accumulating advantages for their countries, eager to outmanoeuvre their opponents, shrewdly tailoring environmental concerns dictated by their country's economic

¹⁸⁰⁷ G Rose & G Paleokrassiss 'Compliance with International Environmental Obligations: A case study of the International Whaling Commission' in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 150-51.

¹⁸⁰⁸ Article 65 ('Marine Mammals') of UNCLOS. See [Annex D.2](#).

¹⁸⁰⁹ D M Ong 'The Convention on International Trade in Endangered Species (CITES, 1973): implications of recent developments in international and EC environmental law' (1998) 10:2 *Journal of Environmental Law* 291 at 295.

¹⁸¹⁰ A Nollkaemper 'The Legality of Moral Crusades Disguised in Trade Laws: An Analysis of the EC "Ban" on Furs From Animals Taken by Leghold Traps' in (1996) 8:2 *Journal of Environmental Law* 237 at 237.

¹⁸¹¹ R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 323.

position'.¹⁸¹² Unlike NGOs and informal local institutions, says Vogler, many governments are nowadays 'held to account by their electorates', and he points out that these might not be willing to protect the commons over their short-term economic interests'. Yet, he remarks optimistically, 'what is more remarkable is the way in which governmental perceptions have changed, and outcomes have occurred which were unthinkable in terms of stated national interests at the outset'.¹⁸¹³

Natural resources can sometimes stretch the boundaries of sovereignty. One might think that the elephant would, in all cases, be a national issue - since each individual elephant must at all times be within the boundaries of a state. Kreuter and Simmons, however, describe the African elephant as being 'perhaps the ultimate common property resource in Africa because of its very large home range, which can vary from 20 sq km to 3 000 sq km depending on water and forage availability'. The legal title to elephants, they say, 'as with most other wildlife, is generally vested with a designated government agency of the country in which they occur'; but that, '[g]iven their fugitive nature, large home ranges, and widespread weak law enforcement, elephants have, however, effectively become an open-access resource in much of Africa'.¹⁸¹⁴

Bonner argues that the world is perhaps wrong, however, to see elephants as being anything other than national property; writing that '[i]f private ownership is one extreme, ... the other is the assumption in the West that the wild animals of Africa, like many other wonders of the world, belong to the world'. 'Elephants and rhino, lions and leopards', he says, 'are not like whales living in international waters' as '[f]or the most part, these land animals live within the borders of a specific country'. Why, he asks, do these natural resources not therefore 'belong to that country, just as copper, coal and oil belong to a country?'. Do we, he continues, 'have more right to tell the Zimbabweans what to do with their elephants than we do to tell Saudi Arabia what to do with its oil?'.¹⁸¹⁵ By way of an answer, he suggests that '[i]f the wildlife of Africa is a priceless world heritage, if it belongs to all of us, and not just to the present generations, but to our children's children, then the world has an obligation to pay for its preservation'; and that this is an obligation which has not been met - with it being 'too easy to impose bans - and make the Africans pay'.¹⁸¹⁶

This raises the question, of course, of the value that can - and perhaps should - be placed on symbols. Bonner asks the question of what would happen if 'Zimbabwe decided to kill elephants not for scientific reasons but simply because people were complaining that there were too many elephants?'. The issue, he says, 'is not just numbers, but sovereignty' and whether international community has 'the right to tell a country what to do about its wildlife'. Conservation, he comments, 'inherently involves value judgments'.¹⁸¹⁷ Along the same lines, Kreuter and Simmons blame the West, particularly the United States, for not understanding the nature of sovereignty over natural resources. They suggest that increased antipathy towards the commercial use of wildlife, 'together with America's increasing involvement in international

¹⁸¹² J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 215-16.

¹⁸¹³ *Ibid* at 215-16.

¹⁸¹⁴ U P Kreuter & R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 39.

¹⁸¹⁵ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 286.

¹⁸¹⁶ *Ibid* at 286.

¹⁸¹⁷ R Bonner 'Western Conservation Groups and the Ivory Ban Wagon' in M M R Freeman & U P Kreuter (1994) 59 at 62.

policy formulation since 1945', have created 'a national psyche which feels justified in imposing its non-consumptive values for wildlife on other sovereign countries'.¹⁸¹⁸

Birnie and Boyle write that 'the salient characteristics of the classical doctrine of common property, as applied to the high seas and their resources, are that they do not fall within the sovereignty or sovereign rights of any state, and are free for use and exploitation by vessels of all nations'. They then point out that the history of whaling, pelagic sealing, and now high seas fisheries has been such that it can reasonably be argued that 'sustainable development of common property' is an 'oxymoron' in this context. Garret Hardin's description of the 'tragedy of the commons' remains, they say, the 'most compelling analysis' of the problem of sustainability of common property; where free access to a free and uncontrolled resource which anyone can exploit 'leads inexorably to overconsumption, unrestrained competition, and ultimate ruin for all'; with marine living resources presenting perhaps the best proof of the accuracy of Hardin's conclusion.¹⁸¹⁹

According to Burns and Wandesforde-Smith; at IWC 53 in 2001 '[s]everal developing country parties also accused non-governmental organizations of seeking to undermine their sovereignty through threats of boycotts if they supported whaling'.¹⁸²⁰ So, can NGOs protesting against whaling be seen as threats to sovereignty, and the protection thereof? Certainly the object of such NGOs would have been the protection of cetaceans rather than a deliberate undermining of sovereignty - the effect, however, might be the same in the eyes of the affected developing countries.

It has been argued that it is only within the artificial parameters of the IWC that states accept - albeit reluctantly - such intrusions on their sovereignty. Per Friedheim, '[i]n the world beyond the IWC, most coastal states act as if they have the right to control *all* exploitative activities within the zone. Those who do not forbid whaling or do not have an ideological reason for joining the IWC have also assiduously avoided membership in the IWC. Over one hundred states have whales or other smaller cetaceans within their coastal zone. The citizens of a number of these states take whales and porpoises'.¹⁸²¹ Partly, this is why the present writer suggests that the IWC has become of symbolic rather than 'real take' importance. Although I remain highly sceptical of Friedheim's point that the majority of whaling worldwide is not controlled by the IWC,¹⁸²² his point would almost certainly be true if the taking of 'small cetaceans' is included in the figure.¹⁸²³

Friedheim contends that '[t]he principal difference between the IWC and many other international organizations is the parliamentary nature of the IWC's predominant decision-making system'. He explains that where other organizations 'rely upon consensus rather than votes (or if there are votes, they are formal confirmations of decisions reached by consensus)'; decisions in the IWC 'are made by a minimum three-fourths majority positive vote'. In the

¹⁸¹⁸ U P Kreuter & R T Simmons 'Economics, politics and controversy over African elephant conservation' in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 39 at 42.

¹⁸¹⁹ P Birnie & A Boyle *International Law and the Environment* (2nd ed, 2002) at 648. See 11.2.

¹⁸²⁰ W C G Burns & G Wandesforde-Smith 'The International Whaling Commission and the Future of Cetaceans in a Changing World' (2002) 11:2 *RECIEL* 199 at 200.

¹⁸²¹ R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 324.

¹⁸²² See (n 1675).

¹⁸²³ See 2.4, (n 1678) and (n 1796).

strictest sense, therefore, per Friedheim, ‘one might characterize the IWC as a legislative rather than a negotiating system’. The underlying problem, he argues, concerns state sovereignty.¹⁸²⁴

Friedheim continues, arguing that majority representatives in the IWC have either overlooked the underlying sovereignty problems or have a ‘hidden agenda’ and are using the IWC ‘as a venue for attacking sovereignty’. For some stakeholders, he says, saving whales is the objective, while ‘for others reducing sovereignty is what they are after’, and for still others ‘these ideas reinforce each other’ and form what has been called an ‘overlapping cleavage’.¹⁸²⁵

It must be asked, for which ‘stakeholders’ is reducing sovereignty the objective? Friedheim does not attempt to illustrate his point. The idea is again one of symbolism, of course; with the IWC as a battleground for shaping the world’s conservation constructs.

The IWC sees competing ideas of what democracy means, as well as what sovereignty means. Lapointe writes that ‘the primacy of the secret ballot is acknowledged and used in nations such as the United States where their citizens cast ballots in defence of their participatory form of government’; with ‘[f]reedom from intimidation and the freedom to vote one’s conscience’ being ‘key to preservation of the basic rights granted at birth to every human’. The importance of the secret ballot, he argues, ‘is no less serious on the international scene’; since it ‘insures that the smallest, most dependent nation has an equal voice with that of the most powerful’. This principle, he concludes, must be preserved and be made part of the IWC process; and he explains that had the secret ballot historically been in place, ‘several issues would have been different’.¹⁸²⁶ This issue will be returned to, later in this thesis.¹⁸²⁷

Clover writes that ‘[w]e are back to the old question: who owns the sea?’. Fishermen, he says, ‘like to think it is them - especially when they have been given or sold property rights to exploit a sustainable proportion of the stocks, as they have in New Zealand’. The real answer, however, to who owns the sea is, he concludes, ‘everyone and no one’; since ‘if there is an owner of a common resource in a democracy, it is the people’.¹⁸²⁸

This argument is reminiscent of national law of property, where the absolutist concept of ownership cannot be true - no landowner can have absolute rights to use his or her property as he or she desires, no matter how absolute the landowner considers his or her ownership to be. The problem is that enforcement occurs only through a variety of uncertain measures.

11.1.5 Global heritage

Whales and elephants do, in one important sense, obviously stand on different footings, as whales are often not within national borders. Arguably, however, this does not make them

¹⁸²⁴ R L Friedheim ‘Negotiating in the IWC Environment’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 207. ‘Even if’, he explains, ‘the world political system is considered less than anarchic, or has evolved since the Treaty of Westphalia (1648), political entities called nation-states still believe they have an attribute called sovereignty, so that on important issues they are bound only by those measures to which they consent’. His conclusion on this point is that ‘[c]onsensus-based international organizations and conferences are a concession to that perception of sovereignty’. *Ibid.*
¹⁸²⁵ *Ibid* at 207.

¹⁸²⁶ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 136.

¹⁸²⁷ See 16.

¹⁸²⁸ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 220.

‘free for the taking’. Gillespie suggests that ‘[a]rguably, cetaceans belong to no nation or region’; but that ‘this does not make them common property, free for the taking by individuals, regional [international organisations] or countries’. Rather, he says, they ought to be seen as being ‘the property of the international community to whom the IWC, with its mandate to recognise the interests of the nations of the world in safeguarding for future generations, is responsible’. With cetaceans, he concludes, the ‘primary guardian is the international community as manifested within the IWC’.¹⁸²⁹

Kalland argues that ‘a [] strategy [of whale protectionists] involves claiming that whales are not a free good owned by nobody until spotted, chased or captured’; and that, in furtherance of this strategy, ‘attempts are made to turn whales from *res nullius* (an open access resource) into *res communis* (a communal resource), which means that nations without previous interests in whales, Switzerland for example, come to share property rights and management responsibilities with the others’. The claim, he says, that whales are everybody’s property is based on the notion that certain valued resources should be proclaimed ‘the common heritage of mankind’.¹⁸³⁰

Friedheim asks why a state should allow a majority of states within an organization, ‘including many that have no special interest in the issues highly meaningful to that state’, to make decisions that are binding upon that (first) state? In the IWC, he says, the new majority ‘seems to act as if majority rule creates obligations for a minority that override their sovereign rights’. He explains that the ICRW ‘is unusual among environmental agreements in that it allows a three-fourths majority to make decisions on important issues’; with the ICRW’s ‘concession to sovereignty’ being to allow those states that disagree to lodge an ‘objection’, and not to be bound if they do so.¹⁸³¹ The United States, for one, he says, ‘seemingly claims that the dissenting states are bound anyway, because in exercising their objection’ they are ‘reducing the effectiveness of an international environmental agreement’, and therefore subjecting themselves to punishment under US domestic law.¹⁸³²

The present writer does not think that this can be what the United States argues - the argument is a straw man. The US cannot seriously contend, be so naïve as to contend, that a state party is bound simply because, if it does not agree, it comes into conflict with US domestic law. Further, the argument, followed to a conclusion, implies that the US does not have - or ought not to have - the right to act as it sees fit within its own territory.

‘For supporters of a complete ban on the taking of whales’, continues Friedheim, ‘the means are legitimate and merely one aspect of world democracy in action’; since ‘[f]rom their perspective it was about time that an international organization responded to the people of the world who represented a new morality’. Since they represented a majority, he explains the argument of such ‘supporters’ to be, ‘the minority was bound to acquiesce to the will of the majority; sovereignty must give way to a new order, especially since sovereignty has become

¹⁸²⁹ A Gillespie ‘Forum Shopping in International Environmental Law: The IWC, CITES, and the Management of Cetaceans’ Draft article for publication in (2002) 33 *Ocean Development & International Law* 17 at 39.

¹⁸³⁰ A Kalland ‘Whose Whale is That? Diverting the Commodity Path’ in M M R Freeman & U P Kreuter (eds) (1994) 159 at 178.

¹⁸³¹ R L Friedheim ‘The IWC as a Contested Regime’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001)

3 at 9.

¹⁸³² *Ibid* at 9.

less potent in a world dependent on a globalized economy'. What such 'supporters' are trying to do, he concludes, 'is establish a new universal norm' that 'qualifies state sovereignty' on world environmental issues.¹⁸³³ To be truly universal, he contends, rules should apply to all people. In short, his judgment runs, 'sovereignty is going anyway, and what is happening in the IWC is a mere indicator of the direction the world community is taking'; and the 'preservation norm' has gone through a 'tipping point' and 'cascaded' throughout the world community so that all that needs now be done is to have it 'internalized' by the peoples and governments of the world.¹⁸³⁴

The future of the IWC, Friedheim suggests, 'is an important test case of the world's ability to develop rules and rights based on shared norms in an issue area'; and 'a failure in the area of whales and whaling might have a ripple effect'. What is at stake, he suggests, is not only whether aggrieved states will remain members, but whether the IWC can establish rules that will be obeyed, develop effective compliance mechanisms, and whether proper leadership will emerge so that the IWC can escape its present state of 'stasis'.¹⁸³⁵

The position is more complicated, of course; given the twin symbols of elephants and whales. Elephants, at first glance, would seem to stand on a different footing - given their position within sovereign borders. The present writer would like to suggest, however, that in a globalising world and where the primary end-users of elephant products are not located in range states, the sovereignty argument is far more complicated than it initially appears. It is strongly arguable that the international community has rights and interests in controlling trade - and corresponding duties.

Bonner suggests that '[t]he issue is not just numbers, but sovereignty'; with the question being '[d]oes the international community have the right to tell a country what to do about its wildlife?'.¹⁸³⁶ Certainly the international community does not have this right within the borders of states, or at least not to the same extent - that cannot be doubted. However, in respect of trade the issue might be different - especially where a treaty has been agreed to, and where the external community is affected.

The issue of sovereignty can be a serious point of contention. At IWC 54 in 2002, in a written Statement, Antigua and Barbuda referred to the issue of whether Iceland would be allowed to adhere with a reservation to the moratorium on commercial whaling. In its statement, Antigua and Barbuda said that there are matter which 'ought to be handled with extreme care. Countries are understandably jealous of their treaty rights under international law. If we abuse our own procedures, if we stand international law on its head, then we do nothing but bring our own organisation closer to the day when its credibility will be shattered and chaos will reign'.¹⁸³⁷

¹⁸³³ This would have to be an argument for a new rule of customary international law.

¹⁸³⁴ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 9.

¹⁸³⁵ *Ibid* at 9.

¹⁸³⁶ R Bonner *At the Hand of Man: Peril and Hope for Africa's Wildlife* (1993) at 105.

¹⁸³⁷ IWC Draft Resolutions of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki): Statement by Antigua & Barbuda on Iceland's Reservation to ICRW (IWC/54/27).

Ultimately, whales and elephants stand on different footings, so to speak in the whale's case, in the sense that the former belong to an 'open access regime' and the latter are within national sovereignty. Nevertheless, there is a cogent argument to be made that, despite this obvious difference, their destinies are mingled and many of the same sovereignty issues arise in respect of both.

11.2 The tragedy of the commons

11.2.1 The oceans

The world's understanding of, and attitude toward, the oceans has changed much over the centuries. D'Amato and Hargrove write that '[t]he legal conception of freedom of the seas was launched in eloquent terms by Hugo Grotius in 1608' who described the oceans as being:

that expanse of water which antiquity describes as the immense, the infinite, bounded only by the heavens, parent of all things; the ocean which the ancients believed was perpetually supplied with water not only by fountains, rivers, and seas, but by the clouds, and by the very stars of heaven themselves; the ocean which, although surrounding this earth, the home of the human race, with the ebb and flow of its tides, can be neither seized nor inclosed; nay, which rather possesses the earth than is by it possessed.

Today, the authors suggest, a realistic view of the ocean system 'is almost diametrically opposed to that of Grotius'; with the oceans being 'very finite indeed' and constituting 'a complex and delicate ecosystem facing injury from many sources'.¹⁸³⁸

As suggested above by the present writer,¹⁸³⁹ this must be seen in the same way that the Roman Law concept of absolute ownership is seen today. Although it is recognised that absolute rights in land are unacceptable and simply not congruent with social obligations, neighbours' interests, general national and international interests, and environmental considerations, we still labour today under the influence of the concept.

D'Amato and Hargrove write that '[t]he classic debate took place in the early part of the seventeenth century. The Netherlands was at the time the dominant maritime country, and its leading international lawyer Hugo Grotius spelled out the arguments in favor of free navigation on all the oceans'.¹⁸⁴⁰ What was really at issue in this debate, according to the writers, 'was the paying of tariffs for navigational use of the high seas'.¹⁸⁴¹

'Of course', they continue, 'the ocean has not been governed exclusively by freedom of the seas since the time of Grotius. There has always been a certain residue of conflict between freedom of the seas, as a guiding principle of conduct in the ocean, and the principle of coastal state control'.¹⁸⁴² This they suggest to have been true 'because coastal nations have been unwilling to grant to maritime powers unimpeded access to the ocean directly off their shores'. For example, they say, 'a narrow strip of the ocean surrounding the coast has come to be

¹⁸³⁸ A D'Amato & J L Hargrove *Environment and the Law of the Sea: A Report of the Working Group on Ocean Environment* (1974) at 1.

¹⁸³⁹ See 11.1.4.

¹⁸⁴⁰ A D'Amato & J L Hargrove *Environment and the Law of the Sea: A Report of the Working Group on Ocean Environment* (1974) at 15-16.

¹⁸⁴¹ *Ibid* at 15-16.

¹⁸⁴² As espoused by Selden. A D'Amato & J L Hargrove *Environment and the Law of the Sea: A Report of the Working Group on Ocean Environment* (1974) at 19-20.

regarded as legally the territory of the coastal states' - in other words, 'subject to the prerogatives exercised by the state as to its land area, for all purposes except certain reserved rights of navigation' as these have been refined by the concept of 'innocent passage'.¹⁸⁴³

11.2.2 Hardin's model

D'Amato and Hargrove explain Garret Hardin's account of the 'tragedy of the commons' as follows:

[i]n the common grazing grounds that existed in seventeenth century England, each farmer bordering on the commons found it to be in his interest to add to his stock of cattle. If there were already fifty cows grazing on the commons, for example, a farmer who owned five cows and added a sixth to his own herd would increase his own capital by 20% while the additional cow would reduce the amount of food on the commons by about 2%. This additional reduction of food would, of course, be a detriment to the farmer in our example of about 2%, but when compared to the increase of 20% in adding a new cow it was eminently worth it to him. But the trouble is that each farmer bordering on the commons makes the same rational calculation, and continues to make it. The result is that the commons is overgrazed and destroyed, causing the economic ruin of all the farmers.¹⁸⁴⁴

The theory may be applied to the oceans instead of to the land; D'Amato and Hargrove writing that the ocean is a 'commons' in Hardin's sense. The point, in the authors' words, is that 'instead of individual farmers bordering on it, similarly acquisitive, self-interested, and one fears myopic, nations control the land masses bordered by the oceans'. Even, they say, when only a few states are involved the 'commons effect' seems to follow. As an example of this, they write, in 1974, that '[o]nly three or four nations at present are actively engaged in whaling, and yet the competition threatens to make whales extinct'. The problem is that while in the short term increasingly sophisticated hunting methods seem to make a profitable return on investment, in the future there 'may well be no more whales'. The commons effect in the ocean, they argue, does not depend on the ocean's continuance to be legally common; since the liquid ocean is a 'natural commons' and '[e]ven if it were totally divided among national territories, it would still be literally a mobile aquatic meadow'. The vast movements of oceanic waters and the processes of ecosystems 'would continue to take place without regard to political boundaries'.¹⁸⁴⁵ The extinction of whales has not actually happened, but enough species have come perilously close to extinction to provide a compelling argument for the application of Hardin's theory to cetaceans.

M'Gonigle explains, of Hardin's theory, that the tragedy of the commons occurs when ownership of the resource is held in common; a large number of users have independent rights to the use of the resource; no one user can control the activities of other users, or, conversely, voluntary agreement or willing consent of every user is required in joint action involving the community of users; and when total use or demand upon the resource exceeds the supply.¹⁸⁴⁶

¹⁸⁴³ A D'Amato & J L Hargrove *Environment and the Law of the Sea: A Report of the Working Group on Ocean Environment* (1974) at 19-20.

¹⁸⁴⁴ *Ibid* at 3-5.

¹⁸⁴⁵ *Ibid* at 3-5.

¹⁸⁴⁶ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 123-124.

As Hardin himself wrote: '[r]uin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all'.¹⁸⁴⁷

According to Vogler, '[f]ollowing the logic of Hardin and other rational choice theorists, actors (who may be well aware of the extent of their long-term interdependence) will still behave towards common resources in a perversely individualistic and short-term way'. He explains that this diagnosis of the 'tragedy of the commons' leads to two alternative prescriptions for its avoidance. These being either that 'common property must be translated into private property'; or that 'the state or some other external authority must intervene to enforce good behaviour or provide public goods'.¹⁸⁴⁸

The theory has been criticised.¹⁸⁴⁹ 'Hardin', Vogler explains, 'correctly identified the overgrazing problem associated with an open access *res nullius*, but the crucial point is that he does not recognize the possibility of a viable alternative to privatization or coercive management in the form of communal CPR institutions or the collective provision of public goods'.¹⁸⁵⁰ Per Vogler further, '[t]he complex interrelationship between economic efficiency and growth, national interests, scientific uncertainty, environmental survival and equity at various spatial and temporal scales provides the context in which the development of the global commons must be considered'. The difficulty, he says, in equating all of these factors explains why Brundtland's concept of 'sustainable development', ensuring that 'current activities do not disadvantage future generations, is at once so politically attractive yet difficult to pin down'. It is all some way removed, he says, from 'the known propensity of an excessive number of cattle to graze away a piece of medieval common land'.¹⁸⁵¹

11.2.3 Solutions

Vogler does offer a solution to the 'tragedy': writing that the solution to Hardin's 'tragedy of the commons' is 'provided by the state'; but that, strictly speaking, 'such alternatives are unavailable for the global commons'. Such areas, he explains, *are* global commons because 'they do not fall under the jurisdiction of any state and the defining characteristic of the international as opposed to domestic systems is the absence of a superordinate authority or world government'.¹⁸⁵²

If there is to be a solution to the 'tragedy' it might be that it will one day be found to have had its beginning in the greater involvement of people in international law-making; and their greater influence on cooperative systems - *vide* the rise of influence of NGOs.

By way of a suggested solution, Clover argues that '[t]he basis of the tremendous economic success of Iceland's fishing industry since 1984 was the introduction at that time of a revolutionary, rights-based system of quotas, which give fishermen a long-term investment in

¹⁸⁴⁷ G Hardin 'The Tragedy of the Commons' (1968) 162 *Science* 1243 at 1244.

¹⁸⁴⁸ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 10-12.

¹⁸⁴⁹ Vogler describes the theory as having been challenged as 'displaying a narrow, pessimistic, instrumental and indeed economic view of human behaviour. It represents one philosophical position which, even its advocates admit, amounts to a necessary over-simplification'. *Ibid* at 12.

¹⁸⁵⁰ *Ibid* at 13.

¹⁸⁵¹ *Ibid* at 15.

¹⁸⁵² *Ibid* at 15-16.

the health of fish stocks'. This, he says, is '[j]ust what the FAO worthies now recommend as the best way of running a fishery'. Iceland's system, he explains, 'of individual transferable quotas (ITQs) has been as successful as it has been controversial'; and 'Iceland's tradeable quotas are not absolute property rights, as were allocated in New Zealand'.¹⁸⁵³ Importantly, Clover explains, 'Hardin was an early and influential advocate of granting property rights to fishermen to persuade them to conserve the resource and to police each other'.¹⁸⁵⁴

In any discussion of regulation of the utilisation of natural resources, it is important to have an awareness of the problem of the 'tragedy of the commons'. Arguably, all wildlife-related international MEAs and regimes have been put in place to deal with this problem.

11.3 Overfishing generally

11.3.1 Early danger signals

As early as 1882 it was recognized that the world could have a problem in respect of overfishing. In that year, the United Kingdom, Germany, France, Denmark and Belgium signed the North Sea Fisheries Convention and agreed to mutual rights of visit, search and arrest of the treaty powers' public vessels.¹⁸⁵⁵ This agreement is staggering when looking at the lack of protection given to the oceans in the early twenty-first century; after more than 125 years little has been done to offer substantive protection to marine species.¹⁸⁵⁶

Concern in fact began earlier even than the 1880s. In the UK, a Royal Commission on the Sea Fisheries was held in 1866. This Commission reported that 'fears of over-exploitation were unfounded' and recommended, in fact, that 'existing laws regulating fishing grounds and closed seasons should be removed'.¹⁸⁵⁷ There are analysts who take a similar line today. However, the reassuring words of the Royal Commission did not prevent widespread concern from spreading as fish became scarcer throughout the UK's coasts. Concern; but, unfortunately, no decisive action. It has been commented that '[i]t is sobering to note that the concerns and problems facing people some 120 years ago are in some ways similar to those of scientists, industry and administrators today'; and that today 'worldwide marine-fish populations are declining at an unprecedented rate, requiring greater international cooperation, research capacity and timely action'.¹⁸⁵⁸

¹⁸⁵³ *Ibid* at 196-213.

¹⁸⁵⁴ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 132-35.

Clover explains that '[i]n later years Hardin confronted the fisheries problem directly. He wrote: "[i]f each government allowed ownership of fish within a given area so that an owner could sue those who encroach upon his fish, owners would have an incentive to refrain from overfishing"...'. *Ibid* at 132-35.

¹⁸⁵⁵ See, for example, AllRefer.com 'Fisheries, Environmental Studies', reference.allrefer.com/encyclopedia/F/fisherie-history-of-fisheries-regulation.html.

¹⁸⁵⁶ E Couzens 'Individuals and Disasters: The Past and the Future of International Environmental Law' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 71 at 83.

¹⁸⁵⁷ D W Sims & A J Southward 'Dwindling fish numbers already of concern in 1883' 9 February 2006 439 *Nature* at 660.

¹⁸⁵⁸ *Ibid* at 660. In a letter to *Nature*, Sims and Southward write that:

... the UK Royal Commission on the Sea Fisheries in 1866, whose officers included Thomas Henry Huxley, reported that fears of over-exploitation were unfounded. The commission recommended that existing laws regulating fishing grounds and closed seasons should be removed. But the rise in fish trade and reports about the scarcity of fish from all around the United Kingdom's coasts strengthened widespread concern among fishing communities and in scientific circles. It all came to a head in 1883 at the International Fisheries Exhibition in London, a conference called to discuss commercial and scientific aspects of the fishing industry. In his inaugural address Huxley repeated the views of the royal commission by discounting reports of declines in fish catches. ... Fortunately, there were some present who ventured to disagree. Their views were put forward by Edwin Ray Lankester. ... Huxley and the royal commission did not foresee the advances in technology that accelerated

Before the Second World War, concern about overfishing could be seen in the 1937 International Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish.¹⁸⁵⁹ Although the United States and Canada did not become parties and the Convention never entered into force; fisheries did, however, receive a temporary reprieve. During the six years of the Second World War there was very little fishing activity worldwide, and fish stocks recovered somewhat. After the Second World War, although a new fishing treaty was negotiated and entered into force,¹⁸⁶⁰ fishing intensified dramatically worldwide.

It is incredible to the present writer that, given that there was international concern expressed in 1882, and again in 1937 and 1946, in relation to fish stocks, there is not now, in the twenty-first century, widespread - global - panic.¹⁸⁶¹ In other words, if there was sufficient concern in the 1880s to take what was, for the time, the extremely radical step of holding a conference - which produced a Convention - of states; it is, to this researcher's mind, almost beyond belief that there is not in the 21st Century great alarm when little or nothing has been done to solve the problem despite our environmental awareness and knowledge having increased exponentially many times. The present writer can only conjecture that because the disaster is of global scale it has not been recognised by policy makers and the general populace, both of whom tend to view things regionally or locally.

It is also a problem which has many causes, which makes it easy for those guilty of one but not another to find a scapegoat. The causes include acidification and eutrophication of the oceans, bycatch and consequent wastage of fish species not targeted (including the damage done to sea-bird populations), climate change (which may have numerous side-effects little thought of, such as ocean thermohaline circulation and continental shelf 'flushing' and nutrient recycling), the creation of maritime dead zones, fragmentation of habitats, habitat destruction (especially of coral reefs and to sea beds from bottom-trawling), increased human coastal development, over-fishing, pollution (in all its forms from raw sewage to heavy metals to acoustic pollution), sea temperature changes, and the spread of alien invasive species.¹⁸⁶² It is the potential cumulative impacts of these various causes that provide the most frightening possible consequences.

11.3.2 *Scepticism*

There are, of course, those who continue to deny that there is a problem; or at least a serious problem. The economist Lomborg writes that '[t]he global fish catch has in the 1990s not increased as much as earlier'; and that 'this is primarily because the world's fishing fleets have

depletion, particularly the move from sail to steam and then motor trawling. Even as late as 1919 there were influential British scientists, such as W.C. McIntosh, who denied that the sea's bounty could be exhausted by human activity. But the earlier actions of their opponents ultimately stimulated the formation of several UK marine laboratories, ... that conduct fish biology and fishery investigations to this day.

Ibid at 660.

¹⁸⁵⁹ International Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish, London, 23 March 1937 (not in force). See, for example, <http://www.nafo.ca/about/history/early.html>.

¹⁸⁶⁰ Convention for the Regulation of Meshes of Fishing Nets and the Size Limits of Fish, London, 5 April 1946 (in force 5 April 1953). See, for example, www.oceanlaw.net/texts/mesh.htm.

¹⁸⁶¹ E Couzens 'Individuals and Disasters: The Past and the Future of International Environmental Law' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 71 at 84.

¹⁸⁶² See, for instance, C Nellemann, S Hain & J Alder (eds)/United Nations Environment Programme Rapid Response Assessment *In Dead Water: Merging of Climate Change with Pollution, Over-harvest, and Infestations in the World's Fishing Grounds* (2008).

a general tendency to over-fish particular stocks' with it being 'estimated that about 35 per cent of the fish catch is obtained from stocks showing declining yields' and this being 'due to a mechanism with which we are all familiar: everyone's responsibility is nobody's responsibility'. The oceans, Lomborg says, 'could produce 100 million tons of fish a year', which we can harvest 'for free' (in the sense that we do not have to feed them). Right now, however, he states, 'we only catch about 90 million tons, the missing 10 million tons being the price we pay for over-fishing the seas'. Of course, he says, 'we would love to be able to get hold of that extra 10 million tons, but this in no way decides the outcome of food availability'; since '[e]ven if the world's fisheries could be perfectly orchestrated such that we were able permanently to catch the extra 10 million tons, this addition would be the equivalent to the increase in the rest of the world's agricultural production over the next 19 days, measured in calories'. Thus, he concludes, '*not* catching the extra 10 million tons is inefficient but in effect equivalent to just putting the world food development back a bit less than three weeks'.¹⁸⁶³

This view does seem appallingly naïve. It appears merely to be a simplistic equation which ignores any extrinsic considerations; such as damage to biological diversity, effects on ecosystems, the dangers of fish farms,¹⁸⁶⁴ the ability of the environment to support fish, and so forth.

Even proponents of increased consumption of natural resources,¹⁸⁶⁵ generally agree that overfishing is a problem. According to Lapointe, '[o]ver the past two centuries, the growing sophistication of fisheries technology rapidly increased harvesting capacity and processing efficiency'; and '[w]ith the technological advances in capture techniques, as well as the ability to process great quantities of seafood on board catcher-processor ships at sea, the world's commercially desirable marine species took a tremendous beating'. Over a period, he concludes, 'of a mere handful of decades, modern fishing fleets took a toll on marine species populations greater than all the fishing pressure by all the fishing cultures throughout history'.¹⁸⁶⁶ As Ellis puts it, 'a million vessels now fish the world's oceans, twice as many as there were twenty-five years ago'. He then asks whether there are twice as many fish as before?¹⁸⁶⁷

11.3.3 Self-interest

The serving of selfish, short-term interests is everywhere. Clover writes, for instance, that '[i]f Europe depended on its own seas for food, draconian solutions to save the fish stocks and

¹⁸⁶³ B Lomborg *The Skeptical Environmentalist: Measuring the Real State of the World* (1998) at 107-108.

¹⁸⁶⁴ *Ibid* at 107-108. Lomborg suggests that fish farms provide a solution to the problem: '[w]e cannot significantly expand our production of fish catch beyond the 100 million tons, precisely because this harvest comes to us for free. Instead, we have started focusing on *growing* fish on fish farms, particularly in China. This production has quintupled since 1984. The consequence has been that even though fish catches have not been able to keep pace with the population growth, the total fish production has increased so much that the fish per capita in the late 1990s once again exceeded all previous years. ... Looking forward, the FAO expects that fish consumption will increase dramatically - per person by more than 23 percent till 2030. This will mean that fish farm production will exceed the catch from traditional fisheries'. *Ibid* at 107-108. It might be asked whether it is possible for aquaculture to replace, generally, the fish humans wish to eat. This is, however, unlikely. The majority of farmed fish, however, are fed on wild-caught fish (see A Morton *Listening to Whales: What the Orcas Have Taught Us* (2002) at 257-270; and (n 2276)) and the ecological consequences of a general fish stock collapse in the oceans are both impossible to predict and utterly terrifying even to think of.

¹⁸⁶⁵ This might be objected to as an unfair characterisation, but what is meant is that such proponents argue against preservation and in favour of increased consumption - albeit *better managed* increased consumption.

¹⁸⁶⁶ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 14.

¹⁸⁶⁷ R Ellis *The Empty Ocean* (2003) at 13.

return them to historical levels might have been imposed by now'; but 'we live in a global market so Europe simply exports its demand for fish, with all the destructive power this has had in its own waters, to other oceans of the world'.¹⁸⁶⁸ One might comment cynically, however, that this is exactly what Europe *is* doing - by exporting its demand it is able to conserve the fish in its own waters.

11.3.4 The real threat

Of course, those who argue that there are 'still fish in the sea' have a point. According to Clover, '[t]he wanton destruction of palatable fish in their millions does not mean that there has been a decline in overall biological production'; since '[w]hile the overall tonnage of palatable fish has reduced by a huge amount, the tonnage of life in the sea - what scientists call the biomass - is probably very much the same'. What has changed, he explains, 'is the relative balance between species'; not that the sea has 'been emptied, as some descriptions of overfishing misleadingly suggest'. This misleading description 'understates the unprecedented nature of what is going on'; which is that 'predatory fish have been removed from the system' and '[w]e are not even sure whether the system will allow them back' or whether what is happening is a one-way 'ecosystem flip'. The greatest weight of living creatures, Clover concludes, is no longer made up of 'long-lived animals, such as the skate, cod or oysters, but small, short-lived creatures, such as prawns, langoustines, Dublin Bay prawns or scampi, sand eels, starfish, jellyfish, worms and plankton'.¹⁸⁶⁹

Perhaps, then, humans will be able to stave off a collapse in food security by turning their attention to the eating of animals which they do not currently 'fancy' - the real danger, however, will arise if it becomes apparent that it is not simply that the appearance of the oceans has been altered, but that the oceans' health has been irremediably ruined.

11.3.5 Management

A major problem of fisheries management has traditionally been inadequate understanding of the correct, or at least the best known, approach to take to management. The management solution most commonly offered is that of 'maximum sustainable yield' (MSY). Dahmani explains the concept of MSY as referring to 'a constant amount of catch produced by a fish-stock at a given effort of fishing'. 'As far as the fishermen are concerned, therefore', he explains, 'MSY necessarily involves the restriction and control of their fishing effort at a given level, beyond which the fish-stock will be over-exploited'; while '[r]estricting fishing effort is not a matter to be decided on the ground of the biological parameters of the fish-stock only, but it is a decision involving economic, social, political as well as biological considerations'. The Law of the Sea Convention, he explains, 'seems to take cognisance of this fact when it provides that the MSY may be qualified by 'relevant environmental and economic factors'.¹⁸⁷⁰ MSY, per Pauly and Maclean, is 'predicated on the idea that, up to a point, catching fish actually increase[s] the amount that [can] be caught'.¹⁸⁷¹

¹⁸⁶⁸ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 17.

¹⁸⁶⁹ *Ibid* at 56.

¹⁸⁷⁰ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 48.

¹⁸⁷¹ D Pauly & J MacLean *In a Perfect Ocean: The State of Fisheries in the North Atlantic Ocean* (2003) at 65.

According to Clover, however, '[t]he pursuit of [MSY] encouraged fishermen to drive down the original population to a lower level - taking up to half of the total spawning stock every year - in the belief that this would boost the productivity of the population. A smaller population, the theory went, would grow faster and reproduce earlier because it had a more plentiful food supply'.¹⁸⁷² M'Gonigle suggests that MSY operates according to the principle that a reduction in the total population of a species makes way for an 'excess' in the ecosystem; and that this will result in an increase in the birth rate, which will in turn make lead to more animals becoming available on a continuing basis. One problem, though, is that this 'ignores the role of other animals which may move in to fill the gap'; and, hence, there is, M'Gonigle says, 'a need for an approach which considers the total ecosystem' and, unlike the MSY approach, explains 'why depleted whale populations have not recovered'.¹⁸⁷³

This argument does lend some support to the modern 'ecosystem' contention that minke whales are preventing the blue whale populations from recovering.

In what state are global fisheries in the 21st Century, truly? The present writer has an impression that they might indeed be in even more trouble than is realised. Historically, a peculiarity of collapsed fisheries seems to be that they thrive just before collapsing.¹⁸⁷⁴ The present writer's idea is that such a compensatory boom might even be what we are in at present - but because it is happening on a global scale we do not realise it. The damage (per Myers and Worm) was done in the 1950s and 1960s;¹⁸⁷⁵ arguably, today, we are simply mopping up the last few (commercially viable) fish. Obviously, this impression cannot be a scientific one - the present writer is not a scientist. The view is based on the innumerable accounts of falling catches worldwide, which far outweigh those of massive harvests; that in talking to fishermen one always gleans much the same story (that fishing today is 'not what it used to be'); and on the sheer logical improbability of the current global fishing effort (with radar, sonar, satellite mapping, global positioning systems, and electronic fish finding systems as aids; the oceans being virtually fully mapped; weather and seasonal patterns being largely understood and predictable; and the ever-increasing demand) being sustainable.

What prospects are there of saving global fisheries? Clover comments that 'seas managed as commons that no one is responsible for are the most likely to fail' whereas '[s]eas controlled by people who know who owns what and have legal responsibilities and assets are the most likely to succeed'. Not all commons fail, he explains, 'but giving rights and responsibilities to

¹⁸⁷² C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 89-91. 'The Newfoundland cod collapse', per Clover, 'was the nightmare that shook the world out of its complacent assumption that the sea's resources were renewable and being managed in an enlightened manner'. *Ibid* at 105. I am not willing to agree with Clover on this one, however - I do not think that the 'world' generally *has* been shaken out of complacency. The situation will have to become far worse than it is at present for complacency to be shaken.

¹⁸⁷³ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 144.

¹⁸⁷⁴ Clover writes, for example, that '[of 1997] ... nature had just delivered one last, miraculously large year-class of cod in the North Sea'. C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 150. Clarke writes, of the collapse of the pilchard (sardine) fishing grounds off Namibia (South West Africa), that the take crashed from 1.4-million tonnes in 1968 to less than 10 000 tonnes in 1980 - and that it has never recovered. Of interest is that after the catch had slumped in 1971 to 646 000 tonnes, it rose in 1973 to 706 000 - but this 'final upward surge' happened because 'under pressure nature tended to compensate by rapid breeding'. J Clarke *Coming Back to Earth: South Africa's Changing Environment* (2nd ed, 2002) at 169-172.

¹⁸⁷⁵ Acknowledged as the source in I Sample 'Plenty more fish in the sea?' *The Guardian* 15 May 2003 <http://www.guardian.co.uk/science/2003/may/15/science.highereducation>. See also, generally, D Pauly & J MacLean *In a Perfect Ocean: The State of Fisheries in the North Atlantic Ocean* (2003).

individuals or small groups of named people generally improves the fishery'.¹⁸⁷⁶ The reality, however, is that the world is seeing increased encroachment onto areas within territorial control - not less. The majority of the world's fisheries are to be found within states' Exclusive Economic Zones, rather than on the high seas, and the chances of a significant number of states altering the present legal regime, or suddenly gaining the ability effectively to enforce control of territorial waters, and of doing this while there is still time to save the fisheries, are slim.

Acknowledgment of the reality of the problem can perhaps be seen in Japan's agreement, in October 2006, to reduce (nearly to half) its annual catch of southern bluefin tuna - with an admission that 'years of overfishing had left stocks at dangerously low levels'.¹⁸⁷⁷

The aim of global players seems to be to restore fish stocks, rather than significantly to change patterns of consumption. Clover points out, though, that nothing says that the 'aim' of restoring stocks will work, just as the aim of 'not crashing them' has not worked 'for the past 15 years under European management, as stocks have sunk lower and lower'. Ignoring the scientific advice, he says, 'is no way to deal with fisheries problems, as we have seen from around the world'; and the 'best practice[s] in these desperate situations include paying fishermen not to fish, buying many of them out once and for all, or creating mechanisms whereby the market can buy them out by allocating rights'.¹⁸⁷⁸ However, there is little urgent prospect of this solution even being tried. By way of illustration of just how outmoded fisheries regulations can be, consider the fact that in the EU it is illegal to land undersized or endangered fish, and so most such caught are discarded (dead or dying) as bycatch - while in Norwegian waters it is illegal to discard such bycatch.¹⁸⁷⁹

11.3.6 Possible solutions

Generally, instead of cutting back on fishing, the fishing industry appears to be seeking new ways to exploit previously 'underexploited' fisheries and species; and there is also a tendency to see fish farms as a solution, despite the various problems associated with these hatcheries. Alarming, in June 2005 a Bill was introduced in the US Senate - federal laws, rather than state regulations, applying in the EEZ - to allow aquaculture pens between 5.5 and 370 kilometres off the US coast.¹⁸⁸⁰ Promoting the Bill, the US National Oceanic and Atmospheric Administration (NOAA) has argued that it would create an industry to produce healthy food in an environmentally friendly manner.¹⁸⁸¹ The Bill was submitted, titled the National Offshore Aquaculture Act of 2005, but was not enacted - despite there having been hearings on the matter in both April and June 2006.¹⁸⁸² The Bill would have, if enacted, granted the Secretary

¹⁸⁷⁶ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 269.

¹⁸⁷⁷ J McCurry 'Japan agrees to cut bluefin tuna catch after admitting overfishing' *The Guardian* 17 October 2006 <http://www.guardian.co.uk/print/0,,329602524-105193,00.html> (accessed 17 October 2006). According to the same media report, Japan apparently admitted it had exceeded its 6 065-tonne quota by 1 500 tonnes in 2005 and agreed to cut its catch to 3 000 tonnes a year for five years from 2007. 'There is also a possibility that Japan may have overfished a bit in other years besides 2005 as well', *Reuters* apparently quoted a Japanese fisheries official as saying. *Ibid.*

¹⁸⁷⁸ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 275-76.

¹⁸⁷⁹ See, for instance, J Vidal 'Film of fishermen dumping catch causes uproar' *The Guardian* 13 August 2008;

<http://www.guardian.co.uk/environment/2008/aug/13/fishing.endangeredspecies> (accessed 25 August 2008).

¹⁸⁸⁰ R Dalton 'Bill on deep-sea fish farms brings wave of disapproval' 23 June 2005 435 *Nature* at 1014.

¹⁸⁸¹ *Ibid* at 1014.

¹⁸⁸² 'National Offshore Aquaculture Act of 2005: S.1195' *US Dept of Commerce: National Oceanic and Atmospheric Administration* <http://aquaculture.noaa.gov/us/2005.html> (accessed 3 June 2008).

of Commerce the power to issue permits to engage in aquaculture in federal ocean waters (in other words, within the US' EEZ). The Bill would also have given the Secretary the power to take emergency measures and to establish rigorous environmental standards.¹⁸⁸³

Subsequently, the National Offshore Aquaculture Act of 2007 was 'introduced' in the US on 24 April 2007 - it appears that the process to be followed is that it must now be voted on by the House, then voted on by the Senate, then 'considered' by the President, before becoming law.¹⁸⁸⁴ The Bill directs the Secretary of Commerce to establish an operating permit process to develop and operate aquaculture facilities in the US' EEZ; to establish a process for the and to issue permits. The Bill '[p]rohibits permits for facilities within 12 miles of a coastal state if the state opposes the activities'.¹⁸⁸⁵ This is worrying as the drive toward such offshore aquaculture would appear to have some momentum - and the consequences remain uncertain.

The argument has been made that although one must be concerned about this, and desperately wish to repair the damage done, this is impossible and one should accept that the seas are no longer capable of being remedied. It is time, therefore, for an ecological shift in man's relationship with fisheries. Marra, for instance, has argued that '[f]ishing in the ocean is no longer sustainable' and that '[w]orldwide, we have failed to manage the ocean's fisheries - in a few decades, there may be no fisheries left to manage'; which raises the question of what ought to be done? 'Following the cultivation of land for food', he suggests, 'society must take the next step: largescale domestication of the ocean'.¹⁸⁸⁶

Marra in fact argues that this is happening already; concurring with Lomborg¹⁸⁸⁷ that it is aquaculture that has been 'entirely responsible for the increase in world fish harvests that has occurred in the past 18 years'.¹⁸⁸⁸ Marra then concurs with the direst predictions of environmentalists that, despite the best efforts at management (such as such as environmental restoration or ecosystem-based fisheries management), the ability of the ocean to supply the fish we take will soon reach its limit. Thus far, his argument runs, most of the expansion in aquaculture has come from farming freshwater species; '[b]ut marine aquaculture, or mariculture, is also growing, and given eventual limits to space on land, moves towards expanded mariculture, such as the recent US proposal (to [legislate expansion of] fish farming in US federal waters up to 200 miles from the coast, and to increase the number of species that can be farmed), will accelerate in the years to come'.¹⁸⁸⁹

Many problems have been cited with fish farming, and Marra concedes that careful consideration is needed of how this domestication should happen 'to avoid many of the pitfalls cited by environmentalists and scientists'. 'Marine farming', he concedes, 'can pollute in ways that are aesthetically, chemically and genetically destructive. ... Second, crowding in aquaculture enclosures or ponds can easily amplify disease and cause it to spread more quickly than it would in the wild. Third, the mariculture of carnivorous species puts additional pressure on fisheries to provide ever-larger quantities of wild fish for feed'. 'But if we

¹⁸⁸³ *Ibid.*

¹⁸⁸⁴ 'National Offshore Aquaculture Act of 2007: H.R. 2010' *House of Representatives* <http://www.opencongress.org/bill/110-h2010/show> (accessed 3 June 2008).

¹⁸⁸⁵ *Ibid.*

¹⁸⁸⁶ J Marra 'When will we tame the oceans?' 14 July 2005 436 *Nature* 175 at 175-176.

¹⁸⁸⁷ See (n 1864).

¹⁸⁸⁸ J Marra 'When will we tame the oceans?' 14 July 2005 436 *Nature* 175 at 175-176.

¹⁸⁸⁹ *Ibid* at 175-176.

recognize', he concludes, 'that domestication of the ocean is starting to happen, we can craft a research agenda to mitigate the problems and maintain both economic and ecological sustainability'.¹⁸⁹⁰

Fishing remains an area in which there has been little movement in international law. The United Nations Law of the Sea Convention (UNCLOS) of 1982 (which entered into force in 1994) settled states' exclusive economic zones at 200 nautical miles. This provides an important protective measure, as the majority of marine living resources are to be found within coastal waters rather than on the high seas. The high seas remain, however, an open-access commons. In the *Plan of Implementation*, Parties to the World Summit on Sustainable Development (WSSD) of 2002, in Johannesburg, committed themselves, *inter alia*, to the following:

[t]o achieve sustainable fisheries, the following actions are required at all levels: (a) Maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015.¹⁸⁹¹

Norway referred to this commitment in its written Opening Statement at IWC 56 in 2004, suggesting that Norway was making 'efforts to implement the ecosystem approach to the management of its marine resources'; and that this was 'in accordance with one of the main goals of the World Summit on Sustainable Development in Johannesburg in 2002, which encourages the application by 2010 of the ecosystem approach to fisheries management'.¹⁸⁹²

11.3.7 Prediction

To this writer, it appears doubtful whether the world's nations will be able to support even this lukewarm commitment - or whether drastic steps will not have to be taken before 2015 to stave off complete and utter, rather than just devastating, collapse. Overfishing of the world's oceans is today a greater problem than it has ever been. The efforts of the drafters of Conventions aimed at the protection of fisheries, such as CCAMLR, have not kept pace with the technological expertise, or the energy and drive, of fishermen; and nor have the various marine pollution Conventions proved effective in combating pollution of the seas, either by way of dramatic oil spills or the continual hazard of operational discharge from the countless vessels plying the seas daily.¹⁸⁹³

The biggest danger must surely be that a global crash in fisheries will occur so rapidly that there will simply not be time for the world to respond - the crash could even be from one year to the next. The history of fisheries collapses has sometimes seen a last, desperate, compensatory breeding spurt before final collapse - and it seems to me that the earth might even be witnessing just such a desperate spurt, which we do not recognize as it is taking place on a global scale.

¹⁸⁹⁰ *Ibid* at 175-176. Pauly and Maclean point out, for instance, that salmon (one of the most commonly farmed fish species) are 'not particularly efficient' - converting into salmon flesh approximately one third of the fish protein they are fed. D Pauly & J MacLean *In a Perfect Ocean: The State of Fisheries in the North Atlantic Ocean* (2003) at 64.

¹⁸⁹¹ World Summit on Sustainable Development *Johannesburg Plan of Implementation* Para. 31. See www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm. See also para's 30-34, in respect of fishing and marine ecosystem management.

¹⁸⁹² IWC 'Opening Statements of the Fifty-Sixth Annual Meeting' ((19-22 July 2004, Sorrento); written Opening Statement by: Norway (IWC/56/OS/NOR).

¹⁸⁹³ E Couzens 'Individuals and Disasters: The Past and the Future of International Environmental Law' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 71 at 96.

When the present writer put the above view to Kleinschmidt, he replied that he thought there was ‘something to that’; and then went on to say:

... I ... that’s what I said right at the beginning, maybe it’s cynical ... there’s a vested interest by all these parties ... they all play themselves into a role ... somewhere in the end I am convinced that there is going to be a further crisis in the oceans ... I think the rogue behaviour ... it’s the last frontier that hasn’t got governance over it yet ... it is a frontier not surprisingly therefore engaged by fishing communities of the world, all of whom, wherever you find them, consist of lawbreakers ... it is not untypical that overfishing is done, unreported fishing, poaching, ... anything beyond the horizon there has no jurisdiction ... and yet people are finding that maybe there’s something to be found there ... not only fish, but minerals as well ... but there’s a big crisis somewhere down the track ... we need a debate that basically says a United Nations for all of the sea is an inadequate instrument to actually manage the sea and we need far more nuts and bolts and braces ... and that debate needs to happen ... probably only come through a crisis.¹⁸⁹⁴

As much as the Parties to the ICRW wish, for their various reasons, to keep what is arguably the world’s most dysfunctional MEA to itself, it is ultimately impossible to divorce consideration of whaling from what, in the present writer’s view, is one of the greatest tragedies of all time - the selfish, short-sighted, and almost complete destruction of the oceans as a set of properly functioning ecosystems. The imminent catastrophe of the worldwide collapse of the oceans’ ecosystems bears directly on the whaling issue for many reasons.

11.3.8 CITES COP 14, 2007

The establishment of a CITES fishery working group was proposed at COP 14 in 2007; supported by the European Union, Jamaica and New Zealand. However, the proposal failed when voted on (in Committee 2) - obtaining only 46 votes in favour with 34 against (two-thirds being required). China, Chile, Japan, Iceland, Argentina, the United States, Norway, Dominica, Brazil and Canada opposed the establishment of the group; Chile, with Brazil in support, arguing that fisheries administration issues should be addressed by regional fisheries management organisations.¹⁸⁹⁵ Also at the COP, Ecuador, speaking for GRULAC,¹⁸⁹⁶ Iceland, Canada, Qatar and Norway emphasised, in a discussion of whether to list porbeagle sharks in Appendix II (proposed by the EU), the need for prioritising national and regional measures; and the importance of the roles of regional fisheries management bodies.¹⁸⁹⁷ In a similar discussion on a proposal by the EU to list the spiny dogfish on Appendix II, Canada argued strongly that it ‘preferred’ national and regional fisheries management measures over CITES listings.¹⁸⁹⁸ This emphasis on regional authority appears to have strong support; especially as, while the EU supported this resolution, it is inherently a body which supports a regional approach to management.

11.3.9 The real motive for Japan at the IWC?

The sense has grown on the present writer, throughout the research toward this thesis, that in many ways the battle over how to utilise and how to protect whales and elephants is

¹⁸⁹⁴ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

¹⁸⁹⁵ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES: Highlights’ *Earth Negotiations Bulletin* Vol. 21 No. 55, 8 June 2007.

¹⁸⁹⁶ This acronym stands for ‘Group of Latin American and Caribbean Countries’.

¹⁸⁹⁷ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES: Highlights’ *Earth Negotiations Bulletin* Vol. 21 No. 56, 11 June 2007.

¹⁸⁹⁸ *Ibid.*

representative of the battle over how to utilise and protect *all* natural resources. In particular, it sometimes seems to me that the focus on whaling - with its various thrusts, feints, withdrawals, threats and concessions; and with all of the financial resources and emotional energy that are put into the battle - may really be just a huge red herring.

For Japan, perhaps the whaling issue is a 'line drawn in the sand (or the water)' in that if the country feels that if it compromises on whaling then it will immediately find tuna becoming the next battle, and then sharks, and so on. Or perhaps the country feels that for so long as it keeps Western environmental NGOs pouring their energies and resources into the whaling issue, it will be left alone to plunder the rest of the sea's resources.¹⁸⁹⁹ It is possible also that the country has accepted that the fish resources of the oceans are now too far gone to be saved and, looking ahead to a time when whales will be seen by all as a necessary food resource, wish to keep in a state of preparedness to exploit this resource.¹⁹⁰⁰

11.4 The precautionary principle

11.4.1 The principle and its status in international law

D'Amato and Hargrove write, in a 1974 *Report*, that 'the current state of knowledge of the oceanic ecosystem does not permit us to assert with certainty the effect of deterioration of the ocean's life systems and the ability of the human species to survive on land, just as we still know relatively little about the consequences of ecological injuries within the oceanic system itself'. That, they say, is not the point; and suggest that we need to be 'interested in the ocean environment from the perspective of those who will be called upon, in fact are being called upon, to make public policy for the ocean'. Sound policy, they argue, 'must be based on an assessment not only of what we know, but how well we know it, and equally important what we do not know'; as only this sort of 'prudent and practical assessment' will enable us 'to determine when it is necessary to act on the basis of imperfect knowledge *now* in order to avoid losing by default our ability to act on better knowledge *later*'.¹⁹⁰¹

According to Kidd, the precautionary principle 'entails the application of preventive measures in situations of scientific uncertainty where a course of action *may* cause harm to the environment' - he then points out that the principle can never be absolute, and that what is necessary is to 'balance the degree of likely risk with the cost of avoidance and the likelihood of the damage eventuating'.¹⁹⁰²

Probably the clearest international enunciation of the precautionary principle to date is to be found in Principle 15 of the Rio Declaration.¹⁹⁰³ This Principle reads as follows:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full

¹⁸⁹⁹ Strangely, it is hard to know whether either of these views damages or assists my argument that whaling has important symbolic value for both sides.

¹⁹⁰⁰ This last suggestion was made to me by Horst Kleinschmidt; email from H Kleinschmidt to E Couzens, 11 August 2008. See (n 1275).

¹⁹⁰¹ A D'Amato & J L Hargrove *Environment and the Law of the Sea: A Report of the Working Group on Ocean Environment* (1974) at 7-8.

¹⁹⁰² M Kidd *Environmental Law* (2008) at 8.

¹⁹⁰³ The Rio Declaration on Environment and Development, adopted at the United Nations Conference on Environment and Development (UNCED), Rio, 1992.

scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.¹⁹⁰⁴

Although the phrasing is labelled as a ‘principle’ it is clearly described as an ‘approach’ - and this is the more common usage. The present writer is not, in fact, aware of an important international instrument in which the phrase ‘precautionary principle’ is used.¹⁹⁰⁵ It is almost as though States deliberately avoid using the term - perhaps in fear of its coming to be seen as really being a principle of international law, if labelled as such.

11.4.2 Criticisms

Hoyt warns that development of the principle is still in its early stages; telling us that the ‘precautionary approach ‘has become widely accepted across various scientific disciplines, in government as well as private and international arenas’. ‘Still’, he says, ‘practical implementation of the precautionary approach in terms of conservation in general and ecosystems-based management and cetacean management in particular is still in the early stages’.¹⁹⁰⁶

The precautionary principle has its critics. Lapointe, for instance, writes that ‘[t]here are those who maintain that, because we do not fully understand the marine environment, or any ecosystem for that matter, we should initiate protectionist measures because resource utilization may lead to irreversible environmental degradation. In a broad brush, this position is called the [p]recautionary [p]rinciple’.¹⁹⁰⁷ He then comments that the principle has been incorporated in so many international legal instruments that it is argued by some that it can now be seen as having become a general principle of international law. His criticism of it, however, is that instead of ‘advancing solutions, the precautionary principle is all too often wielded as a political hammer to control activities that could, in the most infinite exercise of scientific probability, impact the environment’; and he points out that ‘even supporters of the precautionary principle admit that its demands taken to just modest heights are impossible to satisfy’.¹⁹⁰⁸

Lapointe then criticises also the application (or ‘misapplication’) of the precautionary principle to wildlife management tools. ‘There is another problem’, he argues, ‘associated with the precautionary approach’; which is that the ‘approach demands that resource use be stopped until all certainty is assured’. At the heart of this, he says, ‘is the erroneous belief that non-use will eliminate risk to the environment’. As an example of such error, he explains that [i]n the case of certain proposed culling practices, failure to act can lead to a loss of biodiversity due to

¹⁹⁰⁴ United Nations Environment Programme *Selected Texts of Legal Instruments In International Environmental Law* (2005) 86 at 87.

¹⁹⁰⁵ By ‘instrument’ is meant a treaty or convention. The term ‘principle’ is occasionally used in important international documents - such as the ‘European Parliament Resolution of 24 May 2007 on the EU strategic objectives for CITES COP 14’ where the European Parliament ‘[called] on the Commission and the Member States to use the precautionary principle as the leading principle for all their decisions on working documents and listing proposals, also taking into account the user-pays principle, the ecosystem approach and traditional conservation principles’. ‘European Parliament resolution of 24 May 2007 on the EU strategic objectives for the 14th Meeting of CITES’ 24 April 2007 *EN: Official Journal of the European Union* (24 May 2007) <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:102E:0451:0455:EN:PDF> (accessed 30 May 2008).

¹⁹⁰⁶ E Hoyt *Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation* (2005) at 9.

¹⁹⁰⁷ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 5-7.

¹⁹⁰⁸ *Ibid* at 5-7.

the unchecked population growth of one highly successful competitor'; such as where '[e]motional reactions against management actions can lead to a loss of biodiversity' as is happening with 'the huge impact of growing elephant numbers in Africa on habitat critical to other species'.¹⁹⁰⁹

Lapointe does then proffer a solution; writing that '[a] more pragmatic and equitable means of being cautious in regard to use of resources is one that favors a multi-species management approach and that recognizes and respects human needs'. If there is no scientific evidence, he explains, 'that past uses were unsustainable, then there are no unbiased environmental reasons to stop using that resource in a traditional manner'; and, indeed, 'in such cases, scientific evidence often suggests sound reasons to support long-term sustainable resource use'. Science, he advises, 'can also warn of impending problems' such as evidence which 'now indicates that opposing the sustainable use of certain seal and whale populations may cause serious damage to other species, regional fisheries and coastal economies'.¹⁹¹⁰

It appears, therefore, that the precautionary principle can be used to support the arguments of both those in favour of sustained sustainable use; and those who favour a preservationist approach, at least in respect of certain species.

11.4.3 The principle and whaling

Burke writes that '[t]he moratorium on commercial whaling was adopted despite the absence of any finding by the IWC Scientific Committee that a blanket moratorium was needed'; and that '[w]hile there was uncertainty about the data on the abundance of some stocks, which justified a cautious approach, this was not uniformly true'. Even, he continues, 'when scientific information and findings remove serious uncertainty, the IWC majority is unwilling to act'; and '[t]o continue to delay resumption of whaling for particular stocks under stringent catch limitations is an abuse of the precautionary approach as well as a violation of the ICRW and UNCLOS'.¹⁹¹¹

This is a tricky argument to make. The question might be asked: if minke whale populations ceased expanding, and other large whale species did not recover, what might happen to the environment? It is also a dubious proposition that the moratorium was adopted without a blanket moratorium being needed - the moratorium came immediately after several sustained decades of overuse of whales, with no clear and definite signs that overuse would cease.

At IWC 54 in 2002, Australia argued that the precautionary principle 'is a matter of policy not of science'; and that the Commission ought to provide guidance to the Scientific Committee

¹⁹⁰⁹ *Ibid* at 5-7. In respect of elephant culling, the precautionary principle has been relied upon to support the arguments of both those in favour of, and those against, culling. Most commentators who suggest invoking the 'precautionary principle' do so in order to support an argument against too much management intervention; in other words, they oppose culling. However, the argument has been used the other way too. At a 'Science Workshop on Elephant and Biodiversity', for instance, it was suggested that '[t]he fact that we have an uncertain knowledge base and a lot to learn is [] not a valid reason for deferring decisions. The time frame of many problem issues is shorter than that for learning "enough" about them'. K H Rogers 'Elephant and Biodiversity: A synthesis of current understanding of the role and management of elephant in savanna ecosystems' Outcomes of the Science Workshop, Luiperdskloof, March 2005' at 5.

¹⁹¹⁰ *Ibid* at 8.

¹⁹¹¹ W T Burke 'A New Whaling Agreement and International Law' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 69.

‘on the accepted international policy on precaution’.¹⁹¹² This could be seen as Australia being more honest than are most countries (Australia has essentially pinned its colours to the mast and advised that commercial whaling will be unacceptable to it at any point) - or as indication of the fact that the arguments against whaling are becoming scientifically harder to make.

Friedheim writes that ‘[t]he precautionary principle [] has been little invoked in IWC proceedings, at least as far as my perusal of IWC documents shows’; but the RMP is ‘very precautionary’, which ‘means that, while little invoked in the IWC, the RMP is fully consistent with the current trend in international management’. Indeed, he says, ‘it might be claimed that the Scientific Committee of the IWC is a leader in applying the principle to a real management problem’.¹⁹¹³ Although there is, he continues, no ‘cookbook’ formula for the precautionary principle, ‘some ideas are emerging that are viewed by many observers as requirements for invoking the principle in practice’; some of which are ‘best scientific evidence’, and ‘sound statistical evidence’. The precautionary principle, he concludes, ‘requires the development of a risk-averse, not a risk-free approach, and perhaps one whose financial costs might make the benefits seem not worthwhile in the eyes of potential future whalers’; but these proposed whalers ‘must consider such measures as the price of getting whaling restored and try to make them workable’.¹⁹¹⁴

¹⁹¹² IWC ‘Chairman’s Report of the Fifty-Fourth Annual Meeting’ (20-24 May 2002, Shimonoseki) at 31.

¹⁹¹³ R L Friedheim ‘Fixing the Whaling Regime: A Proposal’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 318-19.

¹⁹¹⁴ *Ibid* at 319.

12 Valuing the environment

12.1 Different views

12.1.1 *Exploitation*

Mowat claims that '[t]he last three decades of this century have witnessed the eruption of the most significant internal conflict ever to engage the human species'. This, he says, is not the struggle 'between capitalism and communism' or between any other set of 'isms'; nor the contest 'between affluent societies and impoverished ones'; nor 'the conflict between warmongers and peaceniks'. Rather, he says, it is 'the conflict between those who possess the means and the will to exploit the living world to destruction and those who are banding together in a desperate, last-ditch attempt to prevent the New Juggernaut from trashing our small planet'.¹⁹¹⁵

This is dramatically put, and - crudely - sets out the terms of the debate. Unfortunately, it is just not that simple. After all, when one thinks of industrial juggernauts one thinks at once of the United States - and yet the US is leading the preservationist battle in respect of both whales and elephants.

12.1.2 *Alternative views*

Komatsu and Misaki, worth quoting at length on this point, write that:

[a]ll developed nations, including Japan, have exploited various wildlife resources, driving some to depletion and, tragically, others to extinction. ... Human activity has invariably been the cause of these creatures' demise, be it through killing them directly, destroying their habitat or introducing other species into their environment. The developed world in general has a guilty conscience today - and for good reason in many cases. The drive to protect such species is now on, and it is a worthy and noble goal in itself, as long as it is not dictated by emotion devoid of logic and reason. ... After a period of protection, the elephant is making a healthy recovery in Africa, so much so that in the southern parts of the continent its recovery has been a little too strong, and it is now to be found in greater numbers than are sustainable. ... In a nutshell, developing countries live closer to nature, and like the Japanese coastal whalers of yesteryear, ... they do so largely without killing off the resources that sustain them. They need nature, and therefore protecting it is a matter of their own survival. For this reason, rather than coerce them, we in developed nations should to an extent look and learn. They are responsible for their own resource management, and in large part they do it well. Three southern African countries - Namibia, Botswana and Zimbabwe - have been seeking CITES approval to trade in ivory, as there is no shortage of elephants in their countries, and they can foresee an industry that offers jobs and a significant economic boost to their lands. Unfortunately, as with whaling, Western NGOs have aggressively opposed their CITES submissions. They have harassed the countries' delegates with another Western 'feel good' campaign - this time it's 'save the elephants' - that gives short shrift to sustainable resource use and even less consideration to the people who could earn a living from a worthwhile industry.¹⁹¹⁶

This provides further linkage. There is an admission that developed countries are at fault; but the developed countries are divided on the best way forward. It may, perhaps, really be true

¹⁹¹⁵ F Mowat 'Forward' in P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at v-vi.

¹⁹¹⁶ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 110-111.

that Japan is willing to learn from the developing world; but it must be asked, why, then, not also from Kenya?¹⁹¹⁷

Komatsu and Misaki contend that 'it would be quite wrong to try to force our ways on these [African] people'. 'Our urban ways', they say, 'are quite inapplicable to the way of life of African communities'; but that '[i]t is not unusual, however, to hear Europeans and Americans demand that Africans stop eating elephant or gorilla meat'.¹⁹¹⁸ The truth, they conclude, 'is that wild animal meat is the gift that nature has produced from African soil, and it is wrong to force these people to change their diet to cater to Western sensibilities'.¹⁹¹⁹

The rhetoric is familiar; whales having been described as the 'gift from the sea'.¹⁹²⁰ The linkage is important here. The Japanese, it appears from Komatsu's words, are drawing links between the 'West' telling African people how to use their natural resources in the same way as, Japan claims, the 'West' is imposing its standards on Japan.

Hanks suggests that it might be profitable to consider a report written for UNESCO in 1960 by the late Sir Julian Huxley. Describing the conservation of wildlife and natural habitats in Central and East Africa, Huxley apparently wrote:

[L]et me state the African situation in ecological terms. The ecological problem is fundamentally one of balancing resources against human needs, both in the short and in the long term. It must thus be related to a proper evaluation of human needs, and it must be based on resource conservation and resource use, including optimum land use and conservation of the habitat.¹⁹²¹

Huxley, says Hanks, 'was calling attention to the necessity for evaluating human needs, and then meeting these requirements by planning the *long-term conservation of all available resources*, a philosophy far removed from present-day African practices'. It follows, says Hanks, that 'if all the wildlife species and their habitats are to survive in Africa - and hold their own against the demands of man - they must all become part of a multi-disciplinary form of land use' and become subject to 'wise-use' as and when necessary.¹⁹²²

Reeve writes that '[w]ildlife trade is an emotive issue' and '[i]ts control has been justified scientifically, economically, ethically and aesthetically, with viewpoints ranging from overtly anthropocentric to overtly biocentric'. Conservationists, she says, are often placed in two camps; these being the so-called 'protectionists', who believe wildlife should be protected for its own sake, and - in the other camp - those who promote 'sustainable use', in other words 'the consumptive use of wildlife at a sustainable level as a means to conserve it'. In reality, she comments, 'this is an over-simplification, and there are many shades of grey opinions'.¹⁹²³

Nowhere is this more true than in the United States, when it comes to differences of opinion; although these might be in black and white, rather than in grey.

¹⁹¹⁷ See (n 1602).

¹⁹¹⁸ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 155.

¹⁹¹⁹ *Ibid* at 155.

¹⁹²⁰ See (n 2033).

¹⁹²¹ J Hanks *A Struggle for Survival: The Elephant Problem* (1979) at 161.

¹⁹²² *Ibid* at 161.

¹⁹²³ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 14-15.

Protectionists, Reeve continues, can be pragmatists; and those who promote ‘sustainable use’ can ‘appreciate the intrinsic value of wildlife’. Nevertheless, her argument runs, ‘it is possible to distinguish loosely one group, which perceives international trade as a threat on the basis of its overall track record, from another, which promotes it as a benefit, providing an incentive for good wildlife management’. These two groups, she says, ‘often pull against each other in their attempts to influence CITES, a dynamic that has caused sharp divisions, most notably over the ivory trade’. She explains that a ‘dogmatic application of sustainable use theory also tends to exclude ethical considerations, such as whether consumptive exploitation of certain species should be taboo’; in which regard whales, elephants and primates ‘come to mind’. Ethics, she says, ‘are all too often ignored by conservationists on both sides, who have a tendency to adopt and sometimes misuse scientific arguments to support their case’.¹⁹²⁴

According to Thomson, ‘[b]iopolitics is the influence, positive or negative, that political decisions have on wildlife resources’. It is, he says, the biggest single factor that determines the fortunes of wildlife populations, the habitats that support them and even the very existence of our game reserves; with no other factor in the wildlife scenario being as important. He points out that, in western societies particularly, there is ‘an inherent danger to wildlife from the democratic processes that elect the people’s representatives to parliaments and that put political parties into power’. This is because ‘[p]eople put politicians into power; and people remove politicians from power’ and so ‘the aspirations of the public can, and often do, affect the decisions of politicians’. The ultimate point this leads him to is that politicians cannot be expected to understand the science necessary to make the correct decisions, when they are subject to multiple influences and pressure groups.¹⁹²⁵

Thomson, writing in the mid-1980s, then goes on to discuss the cessation of whaling; writing that ‘[i]n recent times we have seen the practice of whaling stopped - an urgent necessity long overdue - by the Green Peace movement, which is a positive contribution to the wildlife resources of the world’. He suggests, however, ‘that this commendable and desirable achievement has been evaluated by the general public on the strength of all the wrong reasons’ - it being vitally ‘important that whaling be stopped because the world’s stock of whales were being grossly over-exploited’; but it not being important ‘that it be stopped because it was desirable to do so on compassionate grounds’. With foresight, he writes that ‘[i]t should be remembered that one day, when the world’s oceans are again restocked with whales, it will become equally desirable to resume whaling in the interests of the survival of mankind’. Whales, he says, ‘are products of the oceans that, under the right circumstances and with proper controls, *should* be harvested for the benefit of man’. He concludes that his hope is that ‘some of the illogical reasons that were recently brought to bear to *stop the practice of whaling* will not be used to hinder the *reinstatement of whaling* when the time comes to resume the harvest of these large and valuable animals’.¹⁹²⁶ His words are strikingly prescient of the current pro-whaling argument.

12.1.3 Symbolic value

¹⁹²⁴ *Ibid* at 14-15.

¹⁹²⁵ R Thomson *On Wildlife “Conservation”* (1986) at 133-135.

¹⁹²⁶ *Ibid* at 130.

Hanks writes that '[t]he controversy surrounding the sale of elephant skins, meat and ivory is a classic example of radically different cultural interpretations of the ethic for living sustainably'. Should the elephant, he asks, be exempt from an evaluation of 'sustainable use' because of ethical considerations; and, if so, whose ethics should count? Can the elephant, he asks, 'survive in large parts of Africa if it does not have a value other than for viewing by tourists?'.¹⁹²⁷

'The focus of the debate for those countries arguing for a lifting or partial lifting of the trade in elephant products is', Hanks says, 'the following question: why should impoverished African countries look after large and potentially destructive animals such as elephants unless they have a value to the country as a whole, or to local communities that are threatened by the presence of elephants?'. He then questions what the economic value of elephants might be to each country, explaining that elephants might have both direct economic value (through tourism and the ivory trade, for example); and indirect economic value (through their ecological roles in their ecosystems); and 'preservation value' - especially as preservation of elephants might benefit other species also.¹⁹²⁸

Given these variables, Hanks argues that the 'sum total of the economic value of elephants to each country is not an easy statistic to quantify'; but suggests that 'it should be obtained before rational and objective management decisions can be made about the future of elephants in Africa'. On the one side, he suggests, 'sits Kenya, where elephant stocks are valued much more highly for their tourism-generating capacity than for their ivory'.¹⁹²⁹ Probably this is the truth - Kenya has decided that making the elephant a symbol benefits Kenya more in economical terms.

It is currently difficult to argue in strictly economic terms against the Southern African position in regard to exploitation of elephant and rhinoceros products, and also against the Japanese and Norwegian position in respect of whaling. This is because set against the tangible benefits to the countries' economies and conservation efforts is an intangible - the value of the elephant as a symbol which can attract international tourism and goodwill, and as a symbol of conservation. And the value of the whale and the elephants as creatures with inherent rights to life, as keystone creatures in their environments, and as symbols of conservation and environmental protection. This is perhaps an important idea. This point goes to issues of how we set about weighing intangibles when doing cost-benefit analyses in the environmental field.

The struggle between conservation and preservation rages on; as much a battle over value judgments as over science. Bonner writes that '[t]he battle among conservationists over the utilization of resources is almost as old as the organized conservation movement' and that although 'conservation' has become an all-embracing term meaning 'all efforts to save the environment and resources, initially it meant the wise and planned use of resources - wise and planned, but use nonetheless'. In the United States, he explains, this was 'the foundation for the conservation movement and for the first conservation laws' and came to be known as the 'utilitarian' approach to conservation. He records that, in an opposing camp individuals, such

¹⁹²⁷ J Hanks 'Foreword: A Southern African Opinion' in D & S Balfour *African Elephants: A Celebration of Majesty* (1997) 22 at 22-24.

¹⁹²⁸ *Ibid.*

¹⁹²⁹ *Ibid.*

as John Muir, argued that ‘nature should be left undisturbed by man for aesthetic or ethical reasons’; earning themselves the term ‘preservationists’.¹⁹³⁰ It might be asked whether the US has abandoned the former to suit its selfish ends as its power has grown.

According to Komatsu and Misaki, ‘[i]t is often stated that world trend or opinion is to end whaling’. However, they state, ‘only 49 countries of the world are the members of the IWC, which remains under the control of the anti-whaling nations’; and, in ‘other international organizations that embrace a larger membership, the perspective for sustainable use of wildlife is more influential’. The sustainable-use doctrine, they argue, ‘is the world’s mainstream thinking’ and in ‘those organizations, the sustainable use of wildlife are the core group’. CITES, they suggest, is a good example ‘with 160 member countries and many are from developing nations’.¹⁹³¹

It is interesting that commentators involved in the debate are beginning to see linkages between CITES and the ICRW; and important to realise that while each might in itself be a battlefield in the war, it is in the specific linkage between the two that one of the decisive battles might be fought.

The present writer asked Herman Oosthuizen how important he thought whaling *really* is; whether it is important merely in its own right, or as part of the entire drive for sustainable use - for the use of ivory and hardwoods and fisheries generally, for a whole philosophy of sustainable use worldwide? Oosthuizen answered as follows:

I think you’re right there because ... take whaling for example, in Japan, it costs them a lot of money ... because they’re sending the fleets down and so on ... commercially, it’s doubtful if it’s viable ... Why are they pushing so hard for whaling? Is it because whaling is a part of their culture? Or does it form part of the sustainable utilisation of marine living resources question? Or a combination of both? It’s not only elephants that can be used... but also tuna ... and other living resources ... I think there is a much broader battle being fought over the allocation of these resources with the IWC one of the more important battlefields ...¹⁹³²

Asked whether it could be said that the value of symbolic species made them a battleground for all other species, Horst Kleinschmidt replied: ‘I would completely agree. That I think sums it up ... for me that is quite correct ... and whatever happens there will in the end confirm how we deal with other species ... terrestrially or in the oceans ... I fully agree’.¹⁹³³

The present writer asked Douglas Butterworth whether, again, whaling is really important for Japan; or whether its importance lies in its being part of the big picture, of fishing generally, tuna particularly, hardwoods, and ivory. Putting it in a slightly different way, I asked whether he thought the importance of whaling lies in linkage; in an ‘ecosystem of interests’. His answer was that it was linkage that was important; asserting that ‘there’s no way whaling on its own is sufficiently important economically for any of these countries’. He then argued that the real issue was the ‘drawing [of] a line in the sand’. ‘With all of them’, he said, ‘they know that if they gave up on the whaling issue today, the NGOs would be at them on something else

¹⁹³⁰ R Bonner ‘Western Conservation Groups and the Ivory Ban Wagon’ in M M R Freeman & U P Kreuter (eds) *Elephants and Whales: Resources for Whom?* (1994) 59 at 59.

¹⁹³¹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 25. At the present time of writing, December 2008, there are 83 Parties to the ICRW and 173 to CITES.

¹⁹³² *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

¹⁹³³ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

tomorrow'. 'Basically', he continued, 'one of the worst things that could happen to NGOs in a way is that if whaling stopped tomorrow ... it's wonderful fund-raising'; but he then explained that in a certain sense he has sympathy for NGOs, as they find it very difficult to generate public interest in the other areas where they do good work - the problem, however, being that 'it's got dishonest now'.¹⁹³⁴

Donovan said that he 'probably would' agree that whaling has become a symbolic battleground for utilisation philosophies - although he said that the question was 'one of those interesting ones, because your perspective depends where you're coming from'.¹⁹³⁵

Pro-whaling analysts have argued that the IWC has moved away from the legal purpose of the ICRW. Stone, however, is not convinced; writing that ¹⁹³⁶ ... [t]he publicly professed explanation is facially consistent with the convention: that harvesting has to be *suspended* to allow the collection of more data; the preferred rationale for the additional data is the precautionary principle, buttressed by the claim that to permit commercialization of nonendangered stocks would complicate efforts to police protection of stocks that are truly endangered'. Those, he says, who argue that the IWC 'has strayed from its original purpose understandably point to the proven abundance of minke stocks and the commission's apparent disregard of the Scientific Committee'; but argues that, although his 'own view is that the IWC *has* substantially deviated from its original hunt-oriented character', it is an open question whether this departure is 'so *ultra vires* that a formal rewriting of the ICRW is called for'.¹⁹³⁷

Per Freeman, '[t]here is [a] current reason for critically examining whale protectionists' fear of commoditisation of natural resources'; which is that today 'conservationists (in contrast to those calling for total protection or preservation of resources) point to the importance of allocating economic value to resources in order to provide incentives for their sustainable use'.¹⁹³⁸ What is being advocated, he says, by 'some of the more progressive conservation organizations and thinkers is quite the opposite of what one sees at the IWC'. As an example of this, he explains that 'in the Sustainable Use Program of the World Conservation Union (IUCN), prevailing thinking' is that 'governments and conservation organisations need to begin to promote using wild species rather than stopping such use [and] conservation organisations [need] to think of themselves as marketing agents'.¹⁹³⁹

This is the argument of the sustainable use camp. The question is whether this view is, or may become, the majority view of the world's states. 'In such a deteriorating climate for rational debate', continues Freeman, 'it has become necessary for a country such as the United States (which does support whaling by aboriginal peoples) to insist on maintaining an unambiguous categorical distinction between aboriginal and non-aboriginal whalers'.¹⁹⁴⁰ The US, in other

¹⁹³⁴ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

¹⁹³⁵ *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

¹⁹³⁶ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 272. Stone suggests that 'it is hard to assess what is *intra vires* and what is *ultra vires* for an organization, particularly if, as here, the commissioners do not own up to mutinous motives'. *Ibid* at 272.

¹⁹³⁷ *Ibid* at 272-73.

¹⁹³⁸ M M R Freeman 'Is Money the Root of the Problem? Cultural Conflicts in the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 123 at 136-37.

¹⁹³⁹ *Ibid* at 136-37.

¹⁹⁴⁰ *Ibid* at 136-37.

words, is ‘between a rock and a hard place’ - it has been forced, at least partly by its own hypocrisy, into defending vigorously a position which it might not truly hold and which might yet become so entrenched amongst the world’s states that the US will become isolated.

The importance of the whale as a symbol is expressed by Andresen, writing that ‘[i]n economic terms, whaling has no significance today’; but that it nevertheless ‘touches upon important questions regarding the role of science in international resource management and the self-determination of states, and it is a bone of contention between otherwise close allies’.¹⁹⁴¹

M’Gonigle refers to the special symbolic value of whales; writing that ‘[t]he concerns expressed in the [ICRW] justify preserving all types of natural assets, including whales’; yet that ‘even within the general concern for preserving species, whales are given special recognition’ and often are treated separately. He records that whales have been described as being a symbol of an ‘ultimate end’.¹⁹⁴²

In 1977, at IWC 29, Dr Aron, Commissioner for the United States, delivered a message from President Carter of the US, which included the following words: ‘[w]hales have become symbolic of our environmental problems as a whole. No longer are they viewed as a product from the sea available to those with the technology for their harvest’.¹⁹⁴³

At IWC 52 in 2000, the outgoing Secretary of the IWC Secretariat, Dr Ray Gambell, said that ‘[t]he world has changed but for many people the whale is still a powerful symbol of our natural environment and our hopes for a well managed future, a resource which must be sustained however it is to be utilised, a source of wonder and of pleasure’.¹⁹⁴⁴

At IWC 56 in 2004, India, in its written Opening Statement, stated that the whale, as ‘... “precious heritage” of mankind’ must not be exploited economically or for ‘commercial greed’ in any way that endangers whales’ ‘existence or lives’. The Statement concluded with the suggestion that ‘... “Life Beautiful” ... must include the Beautiful Whale as a symbol of our commitment to preserve nature’s most ancient, most majestic and most mysterious gift to mankind. This is a global heritage and indeed a global challenge’.¹⁹⁴⁵

Victor agrees with Andresen, writing that ‘it should be underscored that whaling is a topic for a small, shrinking audience’; but that ‘the operation of the IWC and the debate about how to manage the whaling problem is one of generic importance because it concerns sustainability, justice, international law, and thus governance’.¹⁹⁴⁶ Victor suggests that in fact the whaling problem is solving itself, ‘principally because tastes are changing’. Another lesson, he

¹⁹⁴¹ S Andresen ‘The Whaling Regime: “Good” Institutions but “Bad” politics?’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 255.

¹⁹⁴² R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 129-130.

¹⁹⁴³ ‘Opening statement by Dr Aron, the US’ International Whaling Commission *Verbatim Records of the 1977 Meeting* ‘Proceedings of the Meeting’ at 10. See 3.2.4 and (n 233).

¹⁹⁴⁴ Appendix 6: The Retirement of Dr Ray Gambell OBE, Secretary to the IWC 1976-2000’ G P Donovan (ed)/IWC *Annual Report of the International Whaling Commission 2000: Covering the 1999-2000 Financial Year and the 52nd Annual Meeting held in Adelaide in 2000* (2001) at 63.

¹⁹⁴⁵ IWC ‘Opening Statements of the Fifty-Sixth Annual Meeting’ ((19-22 July 2004, Sorrento); written Opening Statement by: India (IWC/56/OS/IND).

¹⁹⁴⁶ D G Victor ‘Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 307-308.

suggests, is that ‘although sustainability, justice, and international law have been imperfect in the whaling regime, they have not been irrelevant’ as, ‘[e]ven though the parties fundamentally disagree about principles’, they ‘mime the need for sustainability rather than dissolve the regime’.¹⁹⁴⁷ He then suggests that in fact all parties have ‘made special efforts to remain formally in compliance with their interpretation of international law’. Even the United States, he writes, has ‘flexed its muscles, but it has been careful not to impose sanctions’. His final judgment is that these are ‘significant accomplishments - a sign that international norms and procedures matter’ even when parties are unable to resolve their differences.¹⁹⁴⁸

Working out how to value nature, it can be argued, is crucial to conservation, in whatever sense the word is used. Friedheim contends that ‘[i]t is important to get the costs of whale use correct’; and that by ‘use’ he means ‘not only consumptive use but all uses’. The central problem, he says, ‘underlying the overutilization of open-access or common pool resources’ is that humans treat them as being essentially ‘free goods’. The only private costs of using whales, he says, ‘are the catching and observing methods’.¹⁹⁴⁹

Rose and Paleokrassis write that ‘[u]nlike most other species in the marine habitat’, whales are now accorded a ‘wildlife status’ which recognizes ‘their intrinsic value as species for their own sake’.¹⁹⁵⁰ However, this seems - to the present writer - to be far too simplistic and potentially even dangerous. Value must be accorded to all ecosystem components.

12.1.4 True value

The African elephant is a potent symbol of and for conservation efforts worldwide. However, the true value of wild animal species must be considered not as abstract symbols, but as essential components of their ecosystems. The elephant has even been described as a super-keystone species. It is truly the landscape architect of the African bush and many physical and biological aspects of its habitat are dependent on its continued presence. The fight to save the elephant can be seen, therefore, as a fight to save the elephant’s environment too. The same can be said of the whale.

¹⁹⁴⁷ *Ibid* at 307-308.

¹⁹⁴⁸ *Ibid* at 307-308.

¹⁹⁴⁹ R L Friedheim ‘Fixing the Whaling Regime: A Proposal’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 320.

¹⁹⁵⁰ G Rose & G Paleokrassis ‘Compliance with International Environmental Obligations: A case study of the International Whaling Commission’ in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 148.

13 South Africa and conservation

13.1 South Africa, policy and sustainable use conservation

13.1.1 Whaling

South Africa ceased whaling in 1975, although by that time its whale fishery was no longer of much significance. The country did not oppose the vote in 1982 (South Africa abstained) which led to the imposition of the ‘moratorium’ - and, since then, South Africa has been generally on the side of the anti-whaling countries.¹⁹⁵¹

In mid-2006, the present writer interviewed Maria Mbengashe¹⁹⁵² who suggested that ‘South Africa’s general approach *is* sustainable use’; whilst the country remains ‘conscious of conservation’ and taking ‘consideration of benefits’. She described this as a ‘new approach’ - saying that South Africa’s ‘approach *is* changing’ with the ‘emphasis changing toward sustainable use and development’.¹⁹⁵³ Questioned as to how whaling fits into the ‘sustainable use’ approach, Mbengashe explained that ‘[n]onconsumptive use benefits South Africa in terms of tourism and generation of income’.¹⁹⁵⁴

Questioned as to why South Africa would be against Japan making consumptive use of whales; Mbengashe said that South Africa is ‘a global player’ and ‘wants to be seen as being concerned about conservation’ - whales, she said, ‘are charismatic’. She then advised that ‘[w]e think internally that there *is* an internal contradiction’; and explained that the ‘Japanese Ambassador and a heavy delegation came to my office’ in the period ‘pre-October 2004 - two days before the CITES COP’. They were, she said, ‘wanting support’ - and ‘asking this *very* question’. They apparently said that they ‘support us on ivory’; and asked ‘why can’t you support us, if you’re supporting the principle of sustainable use?’. Mbengashe then suggested that ‘the people from MCM [DEAT: Marine and Coastal Management] need to answer that question’. ‘My sense’, she said, ‘is that it stems from our conservationist past’ and that ‘we do come with our own baggage, as well as our official position’.¹⁹⁵⁵

That the Japanese Ambassador approached Mbengashe in the lead-up to the 2004 CITES COP, in order to point out a perceived contradiction in South Africa’s stances on whaling and on ivory, confirms the importance of linking the two species, the two issues, and the two treaties.

Questioned on South Africa’s position on whaling, and on the authority under which whaling falls, Marine and Coastal Management (MCM); Mbengashe said that one ‘procedurally, would expect consultation and present to Minister/Director-General’. She advised that the ‘GMO position (Cartagena) even went to Cabinet’; and said that ‘this one, I think, should be Cabinet ... because of controversy, an issue for Cabinet’. Portfolio members, she said, ‘also come in

¹⁹⁵¹ See 13.1.2 generally.

¹⁹⁵² Chief Director: Biodiversity and Marine International Cooperation, Department of Environmental Affairs & Tourism.

¹⁹⁵³ *Personal Communication* Interview Maria Mbengashe, Pietermaritzburg, 29 June 2006; E Couzens.

¹⁹⁵⁴ *Ibid.*

¹⁹⁵⁵ *Ibid.*

when controversial'. Asked whether there had been further similar communication from Japan, she said 'nothing from Japanese since'; but added that 'perhaps have gone over my head'.¹⁹⁵⁶

Questioned as to the line which the Japanese delegation took when approaching her in 2004; Mbengashe replied that the Japanese had said 'that we should support them for resuming whaling' and that they had 'referred to their studies that [there would be] no impact on numbers'.¹⁹⁵⁷ Questioned on whether the Japanese had discussed elephants with her; Mbengashe replied that 'the Japanese were interested in elephant hides' and that there had been a '2003 meeting on that'; but that 'Asia [was] not complying with keeping records'. In 2004, she said, 'they were very persistent'. Asked who had represented Japan, she said that it had been the Ambassador, who had not been able to speak much English, and two others.¹⁹⁵⁸

The present writer asked Herman Oosthuizen whether he had ever been approached by the Japanese on the issue of linkage between whales and elephants. He said that he had been, but that South Africa had 'made it very clear' at the IWC that it sees no inconsistency in its voting patterns concerning elephants and whales; and that he believed that the Japanese now recognise and accept South Africa's position. However, he added, 'they will of course still try to link whales and elephants in a debate if they feel it will enhance their position, but that is just part of international debate; even if they understand our position fully, and are in agreement with it'.¹⁹⁵⁹

Asked to explain what had happened when Japan had approached him on the specific issue, Oosthuizen told me that 'a few years ago, before I was Commissioner, when I was still the scientific adviser, official Japanese representatives used to meet with the South African Commissioner asking for explanations on our voting patterns and on why we did not support the Japanese position. Since then, he said, 'they still ask me occasionally during the IWC meetings to explain our position on specific points, but I keep on giving them the same response'; and added that 'every now and then they will try to put pressure on us ... for example, saying "listen you're not consistent with your policy on elephants" ... but that is the case not only with Japan but with many other countries as well'.¹⁹⁶⁰

Horst Kleinschmidt told me that he had been approached on this basis - both before the Berlin meeting, in 2003, and the Italy meeting in 2004. He said that embassy officials from Japan had approached him in South Africa also; as had officials from the Norwegian embassy.¹⁹⁶¹ Asked whether there has also been approaches from the anti-whaling camp, for support; Kleinschmidt said that there had been. 'Yes', he said:

I think certainly I was keenly lobbied by a number of Southern Hemisphere countries to build a Southern Hemisphere alliance of anti-whalers ... I think the New Zealanders were the closest ... acted most on that and invited me to pay a visit to New Zealand, which ... also some soft soap, you know, 'if you want to study anything on fisheries management in New Zealand ... we can talk to you about whaling' ... and so on ...¹⁹⁶²

¹⁹⁵⁶ *Ibid.*

¹⁹⁵⁷ *Ibid.*

¹⁹⁵⁸ *Ibid.*

¹⁹⁵⁹ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

¹⁹⁶⁰ *Ibid.*

¹⁹⁶¹ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens. Also, email from H Kleinschmidt to E Couzens, 11 August 2008.

¹⁹⁶² *Ibid.*

Asked whether there was any any cooperation on any issues between Japan and South Africa at the IWC, as on ivory, Oosthuizen said ‘I’m not the lead agent at CITES, but the scientific adviser ... you’re probably right ... at CITES there ... strategy ... at IWC there’s no formal cooperation ...’.¹⁹⁶³ Asked, finally, whether there had been any debate within his department about the linkage with CITES, Oosthuizen said:

that is why the Department has developed a policy on the use of whales and it is clear there is no linkage between whales and elephants ... the Director-General was actively involved in the drafting of the policy and the Minister has approved it, and both agree there is no linkage ... they agree with our position ... and the argument that we’ve been using consistently ... which applies to other members of the IWC ... especially developing countries ... that the real value from whales is through whale-watching and not whaling we feel that’s where the real benefit comes from ... we genuinely believe whale-watching’s the way to go ...¹⁹⁶⁴

In a sense this is arguably the stance that South Africa has chosen in order to avoid a contradiction between its policies on elephants and on whales - insisting that the two species raise different issues. Whether this stance is correct or not is debatable. It might be possible to keep the two species, the two issues, largely separate, given the different *fora* in which they are currently dealt with, and certainly this is what South Africa is currently attempting to do. However, the separation is not easily maintained as there are issues common to both species, and overlap between them, which will continually recur; and which will make it difficult always to keep a rigid distinction.

In a mid-2007 interview with South Africa’s Minister of Environmental Affairs and Tourism, Marthinus van Schalkwyk,¹⁹⁶⁵ the present writer asked him about South Africa’s much enhanced presence at IWC 59 in 2007; and what had led to that decision. ‘The two previous annual meetings’, said van Schalkwyk, ‘were really extremely disappointing and our view is that international mechanisms, multilateral fora like this are very important’; and added that ‘we firmly believe in taking international relations forward by way of multilateral *fora* and not by way of, only, bilateral relations’. He then said that:

we believe, from our point of view, apart from that principle, being a country that is a part of the like-minded group that is popularly being referred to as the anti-whaling group, that we will be the big losers if the IWC collapses or wither[s] away, and therefore we need a continuation of this body. We believe it’s the only legitimate body that is able to really build consensus on a framework of governance.¹⁹⁶⁶

Asked how he saw the IWC fitting in with SA’s general environmental policy; van Schalkwyk said that:

it’s an important body. Although we practise a policy of non-consumptive use, we think that the opportunities in SA for that sector, we have only started to scratch the sector, there is still a lot of potential. So therefore we wd like to see the mandate of the IWC being really broadened to also make provision for non-consumptive use. So from that point of view this is really quite an important mechanism.¹⁹⁶⁷

This answer led me to my next question, which was what role the Minister thought South Africa might play in the IWC in the future; and the related question of whether he thought South Africa might have a leadership role to play. From the Minister’s answer, I got the

¹⁹⁶³ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

¹⁹⁶⁴ *Ibid.*

¹⁹⁶⁵ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens.

¹⁹⁶⁶ *Ibid.*

¹⁹⁶⁷ *Ibid.*

distinct impression that a significant leadership role is not likely to be on the cards at any time soon. He said:

we will continue to be involved. We have always regarded this as an important institution. But there are other issues. Well, simply as a developing country with limited resources ... we must prioritise internationally where we spend most of our energy ... so we will always be here, we will always have a presence ... our scientists will be involved here ... but this will certainly not be one of the two top priorities which we will concentrate on ... but we will always be here as a support of countries, a constructive country ...¹⁹⁶⁸

Asked whether those ‘two top priorities’ are climate change and CITES; the Minister said that ‘those are, at the moment, are our two top priorities, simply because of the kind of country that we are’.¹⁹⁶⁹ This is fair enough. Breaching the conflict at the riven IWC would require a dedicated effort, would take years, and it is unlikely that it could be achieved by a single country - even one with the moral capital, and the experience of conflict mediation, that South Africa arguably possesses.

Turning to linkage, the present writer put it to the Minister that South Africa’s environmental policy generally is that of sustainable use of natural resources; but that it might be argued that there is an apparent contradiction between South Africa’s general environmental policy, in particular on the ivory trade, and SA’s consistent opposition to commercial whaling. His answer was that ‘sustainable use is not only a policy, it is enshrined in our Constitution¹⁹⁷⁰ - and we practice that policy across the board’. He then expressed his view, perhaps with some understatement, that ‘the situation at the IWC is a bit unique’. Explaining, he said that ‘we’ve always expressed our support for the principle and the policy, the approach, of sustainable use; but what happened here is it became so polarised that it developed into a pro- and anti-whaling faction’. Significantly, though, he then said that ‘we’ve also always made it clear to the so-called anti-whaling group, or the like-minded group, of which we are part, that we are a sustainable use country and as a matter of fact in future we believe that possible compromise and way to take the IWC forward will have to include a compromise on the issue of sustainable use’.¹⁹⁷¹ This may well be the crux of the matter for South Africa. With a completed RMS for the RMP, or even with an RMS that was *clearly* complete but on which it was *manifestly* obvious that only political stalling stood in the way of its adoption, South Africa would find itself under increasing pressure not to support sustainable usage of whales - even where this meant consumptive use.

13.1.2 South Africa’s current policy on whaling

Frankly, for an academic researcher, getting to the heart of South Africa’s policy is not as simple as finding the relevant weblink to the Department of Environmental Affairs and Tourism website - or of calling up a spokesperson and asking for a copy. The policy clearly must be a fluid instrument; and, as explained to the present writer by Herman Oosthuizen, is a ‘document that cannot be made public as it contains some information that could be used by other countries at IWC against South Africa during negotiations, it is meant for internal use’. ‘However’, he added, ‘the broad position of South Africa is well known and available to all’.¹⁹⁷²

¹⁹⁶⁸ *Ibid.*

¹⁹⁶⁹ *Ibid.*

¹⁹⁷⁰ The Constitution of the Republic of South Africa, 1996.

¹⁹⁷¹ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens.

¹⁹⁷² *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

Asked about South Africa's policy, and in particular why there is arguably a discrepancy between South Africa's stance on whaling and its general sustainable use policies; Herman Oosthuizen said that the country's policy *is* that of sustainable utilisation as determined by both our Constitution and our Marine Living Resources Act.¹⁹⁷³ Sustainable utilisation, he said, 'has two components - consumptive use and non-consumptive use (including ecotourism). From the South African perspective, there is no local market for whale meat and international trade is banned by CITES; and the real benefit for South Africa is non-consumptive use from whale-watching. There are thus implications if the whales which we want to watch are killed elsewhere - in particular, humpbacks and southern right whales - which, he said, South Africa would always be opposed to. On the question of opposing whaling generally, Oosthuizen explained that before South Africa could consider it there would have to be a proper management plan in place - in other words, strict control, with international oversight for compliance. Secondly, we must protect our whale-watching industry and make sure of the sustainability of whaling. There is also the humane side of whaling that must first be taken into consideration. This view that South Africa might not oppose whaling once a proper management plan is in place does mean that the country is, in Oosthuizen's view, 'not at odds with other "anti-whaling" countries and that most would have similar positions'.¹⁹⁷⁴

Asked whether whale-watching is really of great significance for South Africa, Oosthuizen replied that:

it is growing ... we are opening up the marine component to ecotourism, which has been neglected ... since 1998 tourism ... competing with other countries so must give people a reason for visiting our country ... it's not only whales that we're promoting, it includes shark-diving ... there's a bigger picture. Also, Government is trying to get the local communities more involved ... if people stay even one or two nights extra it increases the tourism income for the country ...¹⁹⁷⁵

Questioned as to who it is that determines South Africa's policy on whaling, Oosthuizen said that this has always been determined by the Minister of Environmental Affairs and Tourism; following recommendations made by the Department, including from its scientists. The Department of Environmental Affairs and Tourism (DEAT) is the leading agency, he explained, with support from the Department of Foreign Affairs in an advisory capacity; and a document containing South African positions is prepared prior to IWC meetings and which the delegation then uses.¹⁹⁷⁶

Questioned along similar lines, and asked whether as a Commissioner he did not have freedom to vote as he wished, Horst Kleinschmidt explained that 'before you go as a Commissioner, certainly as far as South Africa is concerned, you're going with all the Draft Resolutions which have to be submitted way ahead of the Conference ... and take them to the Minister with your proposed course of voting on each one of them and the Minister signs off on it'. 'To that extent', he said, 'you are not there on your own behest ... I was given considerable freedom because [then Minister of Environmental Affairs and Tourism] Valli Moosa said, well, you know, get as far away from the apartheid position as possible ... but to that extent you can't say it was a completely free position'.¹⁹⁷⁷ When I put it to Kleinschmidt that Mbengashe had suggested to me that she felt this was an issue that might be put to South Africa's Cabinet, and

¹⁹⁷³ Act 18 of 1998.

¹⁹⁷⁴ *Ibid.*

¹⁹⁷⁵ *Ibid.*

¹⁹⁷⁶ *Ibid.*

¹⁹⁷⁷ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

that she seemed to feel that policy on whaling was driven by MCM; he suggested that that view should be seen 'in the context of the overall view that anything in fisheries was not integrated into DEAT, and needed much better management and control of it'. 'Of course', he added, 'the knowledge base for something like that in Cabinet would also be quite low, but I guess that happens'; and he concluded that 'maybe that's how it should go'. He then expressed his view, however, that if the issue was sent to Cabinet for a decision this would probably mean reversion to a middle line.¹⁹⁷⁸

Asked whether he would say that South Africa is, currently, taking a fairly strict preservationist line on whales, Kleinschmidt was categorical: 'yes'. Pursuing the issue, I asked about South Africa's position on whaling being 'out of kilter' with its approach at CITES. Kleinschmidt said that it is not a priority issue and does not have high currency.¹⁹⁷⁹ He argued further that there is 'a similar type of neglect for other aspects in fisheries, where you wd say it wd actually be important that the Minister or someone actually forms an opinion ... that there's a political viewpoint on it ... or that there's a lobby in Parliament that says it shd be this or that ... but there's nothing, there's just neglect'.¹⁹⁸⁰

Questioned on whether there was any division in South Africa on the policy toward whaling, and policy generally, Oosthuizen said that there had been such division in the past - especially because of the elephants and the whales - but that this is no longer the case following the development of a policy on whales, and it had been made clear that the situation was discernible from that of elephants.¹⁹⁸¹

On the other hand, international negotiations can be murky. Horst Kleinschmidt told me that 'although it was never said, my sense is that at CITES, where you have a secret vote, the issue on the ... the South African delegation did not necessarily vote ... consistent with my attitude at the IWC ...'.¹⁹⁸² Kleinschmidt said also that he had 'been troubled by' the apparent discrepancy between whaling and South Africa's official sustainable use line. He did also express his view that whales and elephants stand on very different footings (so to speak), in the sense that elephants can be managed in view, with full knowledge of their numbers - something that is absent in the case of whales.¹⁹⁸³

The present writer then quoted South Africa's former Commissioner, de Jager, arguing in 1973 that South Africa had voted against the Stockholm Conference moratorium resolution on the basis, essentially, that whales represented a sustainable resource which should be used.¹⁹⁸⁴ I

¹⁹⁷⁸ *Ibid.*

¹⁹⁷⁹ *Ibid.*

¹⁹⁸⁰ *Ibid.*

¹⁹⁸¹ *Ibid.*

¹⁹⁸¹ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

¹⁹⁸² *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

¹⁹⁸³ *Ibid.* Kleinschmidt approves of South Africa's adopting a policy approach with regard to the concept of 'sustainable use'; but he feels that sustainability 'is not a term that can be blandly applied without further interpretation and development'. In other words, 'you can apply the sustainability principle from a very low base, and fail to recognise former levels of abundance'. In the case of whaling, any data that should set the measure of sustainability don't exist or are deficient. By comparison, in the Kruger Park it is possible 'clearly to establish all the parameters of elephant sustainability levels and then base a decision on numbers to be killed in a totally controlled environment'. However, this 'does not hold true for migratory species such as whales in the oceans'; especially given the unsatisfactory and brutal manner in which whales are being killed. In sum, he concludes, a simple application of 'sustainability' lacks credibility. Per email from H Kleinschmidt to E Couzens; 11 August 2008.

¹⁹⁸⁴ See 3.2.1 and (n 220).

then asked Kleinschmidt why South Africa did not now follow this policy in respect of whales - whether it was because of the emotion surrounding whaling, and a perception that that is what the electorate wants; or whether it perhaps is a little more sinister, and South Africa is currently voting in its self-interest, in that it gets something from its relationship with the anti-whaling countries.

Kleinschmidt then explained that, in his view, there had been for many years what he described as a 'cosy relationship' between South Africa and Japan; largely, this had been in the area of fisheries generally, with South Africa benefiting financially from regularly servicing Japan's fishing fleets in Cape Town, but in the context of economic interest generally. 'Anecdotally', he said, he could say that there was a 'very friendly relationship' between the two countries; with some 'senior officials' being 'very, very keen on the Japanese line' and there being 'officials who made regular visits to Japan'. It therefore seemed to Kleinschmidt, in his words, that 'our stance at the IWC was principally one informed by an interest that emerged from an apartheid era'. He felt, he said, that it was important for South Africa 'to break with that history and tradition ... there was only one journey to travel, and that was to move from the middle group to the anti-whaling group'; and that, he concluded, was 'how that happened'.¹⁹⁸⁵

This description is not inconsistent with what Douglas Butterworth told the present writer in a description of the history of South Africa's involvement with the IWC in recent decades. Butterworth's view is that South Africa's policy on whaling *is* inconsistent with its general sustainable usage policy, that it 'doesn't hold up' - but that this 'just hasn't been looked at closely'.¹⁹⁸⁶

According to Butterworth, in the late 1970s and early 1980s South Africa and Canada - as they were both taking a middle path - were the subjects of much pressure; and that this eventually saw Canada drop out. South Africa had, until the very early 1980s, a Commissioner named Garth Newman, who followed this *via media* approach; in terms of which whales were seen as a renewable resource, but that the time and the conditions were not right for taking. Newman was replaced by Louis Botha as Commissioner; with Botha being sent to the 1982 Meeting with an instruction *not* to vote *for* the moratorium proposal. Botha abstained in the vote.¹⁹⁸⁷ South Africa, it appears, then went into a long period - with Botha as Commissioner - of attending IWC meetings; but saying very little. This can arguably be ascribed to South Africa's Department of Foreign Affairs, which from the early 1980s saw great value in South Africa being involved in an international organisation, at which it was welcomed, at a time when the country was struggling to retain its standing in the international community generally.¹⁹⁸⁸ This position - staying involved, while keeping its head below the parapet - seems to have persisted until the 21st Century; whereafter the position changed and South Africa shifted toward the 'preservationist' camp under the Commissioners who succeeded Botha: Guillaume de Villiers, Judy Chalmers, and Horst Kleinschmidt.¹⁹⁸⁹

13.1.3 Elephants

¹⁹⁸⁵ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

¹⁹⁸⁶ *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

¹⁹⁸⁷ *Ibid.*

¹⁹⁸⁸ *Ibid.*

¹⁹⁸⁹ *Ibid.* Butterworth advised the present writer that de Villiers had 'personally tried to stick to a sustainable use approach'. Email from D Butterworth to E Couzens; 28 June 2008.

According to Lyster, CITES Article I(a) defines ‘species’ to include ‘any species, subspecies or geographically separate population thereof’. This, he explains, allows different populations of the same species to be considered as independent for listing purposes. He then advises that, at time of writing, there were almost 30 similar ‘split listings’ in the Appendices. The fact, he says, ‘that CITES allows these split listings is important because it enables a Party with a non-endangered, well managed population of a species, that is endangered in other parts of its range, to include its own population in Appendix II and thus allow a limited commercial trade which would be prohibited if the population was in Appendix I’. Conversely, he explains, ‘it also enables Parties to list an endangered population of a species in Appendix I and thus protect it from commercial trade in situations where the species is not endangered in other parts of its range’.¹⁹⁹⁰

This is important because it provides solid international legal authority for South Africa’s stance on the trade in ivory.

Potgieter writes that ‘[t]he whole thing began in 1985 when the member states (including Great Britain) of the UN-sponsored C[ITES] met in Buenos Aires to consider emergency action on behalf of the elephant’. At this Meeting it was apparently ‘decreed that in future no ivory tusk could be traded internationally without an accompanying certificate’; it being hoped that ‘by this single measure, only the tusks of elephants killed through officially permitted culls would end up on the market’ and that ‘[i]vory poachers unable to produce certificates would be driven out of business’. It was, he says, ‘a pious and well-meaning resolution’.¹⁹⁹¹

Potgieter[, quoting Ian Parker,] then continues; writing that ‘[f]or as long as Burundi remained outside the CITES fold, the Convention would be largely ineffective’. The Burundi attitude, according to Parker, ‘was simple: [i]t was not responsible for enforcing its neighbours’ laws’; and if these countries ‘could not enforce their conservation rules, that was their problem, not Burundi’s’.¹⁹⁹² ‘There was, though, ‘one infallible way of getting ivory in Burundi made CITES-acceptable’; which was that ‘[w]hen a country joins the Convention, all wildlife products listed in Appendixes I, II and III that are lawfully held at the time of joining, acquire the status of “pre-convention” products, and automatically become CITES-acceptable in international trade’. The onus, apparently, ‘of determining whether or not an item is pre-convention, lies with the government of the acceding country’ - the rationale for this being that, ‘otherwise, the existence of pre-convention stock would constitute an insurmountable barrier, preventing countries joining the convention’. This obviously, however, potentially constitutes a gaping loophole in the Cites system.¹⁹⁹³ Potgieter then suggests that ‘[o]nce the smuggling syndicates realised they could rely on military protection for movement of their contraband, the elephants and rhinos were systematically mowed down in hail after hail of automatic gunfire, the merciless hunters moving ever farther north’.¹⁹⁹⁴

¹⁹⁹⁰ S Lyster *International Wildlife Law* Cambridge: Grotius Publications Ltd, 1985 at 242-43.

¹⁹⁹¹ De W. Potgieter *Contraband: South Africa and the International Trade in Ivory and Rhino Horn* (1995) at 107-111.

¹⁹⁹² *Ibid* at 112-3.

¹⁹⁹³ *Ibid* at 114.

¹⁹⁹⁴ *Ibid* at 180. On the involvement of South Africa’s military in the smuggling of ivory and rhinoceros horn, see, generally, J Breytenbach *Eden’s Exiles: One soldier’s fight for paradise* (1997); De W. Potgieter *Contraband: South Africa and the International Trade in Ivory and Rhino Horn* (1995); and *Commission of Inquiry into the Alleged Smuggling of and Illegal Trade in Ivory and Rhinoceros Horn in South Africa* Report of the Chariman Mr Justice M E Kumleben, Judge of Appeal, January 1996. See (n 1135).

South Africa has a mixed history in respect of wildlife enforcement. Space constraints have prevented discussion of the subject here, but suffice to say that its military has been involved in poaching and the general destabilising of neighbouring countries - and the country has often proved to be a conduit for wildlife trade. Further, poaching in the Southern Ocean, in South Africa's Exclusive Economic Zones off Marion Island and the Prince Edward islands, may be more serious than is known - particularly of the endangered Patagonian toothfish. The country also suffers from some serious poaching problems - such as the rampant destruction of the perlemoen industry; and apparent organised poaching of rhinoceros horn. At the same time, within its system of protected areas, South Africa largely has poaching under control. Certainly, it is not rampant - and ivory is seldom poached. The country did once, however, have one of the continent's most effective wildlife-related crime investigation units - and one which was integrally involved in the setting up of, and initial training in, an international enforcement unit.

Reeve writes that the Endangered Species Protection Unit 'is one of the oldest specialized wildlife law enforcement units'; having been 'established in June 1989 to prevent the use of South Africa as a conduit for ivory and rhino horn smuggled from neighbouring countries. She advises that '[u]ndercover operations have always been an important element in ESPU's work'; and that 'ESPU has trained wildlife law enforcement officers in other African countries, including a similar unit established in Namibia' as well as conducting training 'through the Lusaka Agreement' and initiating 'joint operations with officers in neighbouring countries'. She warns, however, that '[d]espite its international recognition and contribution to enforcement in other African countries, ESPU faces the prospect of closure as part of a three-phase plan to close all specialized units of the South African Police'; something that, together with 'a perceived lack of political will to address wildlife crime, is undermining the work of the unit'. She warns further that 'the loss of ESPU would be a major step backwards - from both an international as well as a national perspective' - especially '[g]iven that South Africa is a major transit point for wildlife from other African countries to markets in Europe, the United States and the Far East, as well as a source of CITES-listed species and a market in its own right'.¹⁹⁹⁵ The ESPU has now, however, been closed.¹⁹⁹⁶

South Africa *has* the intelligence skill to deal with poaching. In this regard, interviewed by the present writer, Donald Kaniaru, suggested that South Africa is selfish not to assist other countries.¹⁹⁹⁷ It is worth considering also South Africa's not getting involved with the Lusaka Agreement ... in fact, possibly working *against* it.¹⁹⁹⁸

Pickover writes that '[h]istorically, South Africa has always favoured the consumptive use of wild animals' and that 'today this use is part of the language of development'. She suggests that this is because 'the South African perspective on animals reflects markets and unlimited growth'; with the Department of Environmental Affairs and Tourism believing 'wise use' to be the 'cornerstone of government policy' and the country wanting to 'export its conservation policies to other countries in Africa'.¹⁹⁹⁹

¹⁹⁹⁵ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 230-32.

¹⁹⁹⁶ *Ibid* at 56. Pickover writes that '[i]n 2000 the now defunct South African [ESPU] raised serious doubts about South Africa's capacity to enforce CITES regulations or for customs to control illegal trade at the country's 91 entry and exit points, and its concern appears to have been justified'. *Ibid* at 56.

¹⁹⁹⁷ See (n 1099) and (n 1645).

¹⁹⁹⁸ See 13.2.1 and 13.2.2.

¹⁹⁹⁹ M Pickover *Animal Rights in South Africa* (2005) at 7-8.

Parker contends that '[w]hite South Africans know more about managing their indigenous fauna than any people on this planet'. As evidence of this he explains that '[t]hey brought both their elephant and white rhinos back from the brink of extinction to the point where they lack room for more'; and that '[t]hese two cases stand high among the twentieth-century preservation success stories'. South Africans, he argues, 'need no advice on how to manage such animals and, what is more, they *know* that they need no advice'; being '[p]re-eminent in the world, *they* are best placed to tell others what to do'. Once apartheid was banished, however, he writes, South Africa's 'certitude went with it' and '[i]n no time they, the real experts, were seeking opinion and advice from western conservation bodies'. Forgetting, he says, 'that they introduced game laws three centuries before North America coined the term national park, they threw away their pre-eminence like an old shirt'; and they now 'grovel before immensely ignorant western conservation lobbies with all the genetic expertise of a dog rolling over on its back when confronted by a dominant'.²⁰⁰⁰

This might seem a harsh judgment, but South Africa's usual pro-sustainable (consumptive) use of wildlife is arguably at odds with its anti-whaling stance. Precisely what South Africa's policy is is not entirely clear - it cannot be, as this is not publicly disclosed. Through interviews with various important role-players and commentators, an effort was made in this chapter to discern this policy - and to consider its consistency with South Africa's policy on the use of elephants.

13.2 Southern African regional initiatives

13.2.1 *The Lusaka Agreement*

According to Reeve, '[t]he Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora was adopted in Lusaka, Zambia, on 9 September 1994 [Lesotho, Kenya, Swaziland, South Africa, Uganda and Tanzania signed on 9 Sep 1994 - fn 66] and entered into force on 10 December 1996'.²⁰⁰¹ The agreement's core provision, she says, was 'an inter-agency Task Force composed of wildlife law enforcement officers seconded from designated National Bureaus'; and 'was the brainchild of the first head of the ESPU, Pieter Lategan'.²⁰⁰² It is ironic with hindsight that South Africa was involved right at the beginning.

Reeve continues, writing that '[n]egotiated under UNEP auspices, the agreement is open to accession by all African states, of which six have become parties: Congo (Brazzaville), Kenya, Lesotho, Tanzania, Uganda and Zambia. Ethiopia, South Africa and Swaziland are signatories'.²⁰⁰³ 'The agreement', she says, 'has had a rocky ride', as, '[d]espite setting a precedent for combating organized wildlife crime across borders and strengthening enforcement of CITES on a regional basis', its implementation proved to be a lengthy and at times difficult process - especially in its early days. Although it entered into force relatively quickly, she explains, 'it then remained in limbo for over two years for lack of funds'. Major donors were apparently 'unforthcoming with funding to establish the Task Force, despite several approaches, and parties, all of which are developing countries with limited financial

²⁰⁰⁰ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 388-89.

²⁰⁰¹ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 232-33.

²⁰⁰² *Ibid* at 232-33.

²⁰⁰³ See the Lusaka Agreement website at <http://www.lusakaagreement.org/about-us.html> (accessed 4 June 2008).

resources, could not afford the initial assessed annual contributions'. It did not help this process, she continues, 'that South Africa, a key country in the founding and negotiation of the agreement, failed to ratify it'.²⁰⁰⁴

It is arguable in this regard that South Africa is in breach of its 1969 Vienna Convention obligations, in creating the SADF Protocol. Per the Vienna Convention, a state which has signed an international agreement has an obligation not to undermine the objectives of that agreement - even if the state has not actually ratified the agreement²⁰⁰⁵ - and it might be argued that in creating the SADF Protocol South Africa deliberately thwarted the Lusaka Agreement. Naturally, this is not a point that will ever be pursued as no other state is going to tackle South Africa on it. However, from the present writer's academic standpoint, it goes to the point that other African states might find it difficult to trust South Africa.

'Then', Reeve goes on, 'in March 1999, ... the Governing Council of parties decided to make the LATF operational from 1 June 1999 with their own financial contributions; ... Tanzania was the first to come forward with funds ... and the headquarters established in Nairobi at the main offices of the Kenya Wildlife Service'. 'The only donor funds', according to Reeve, 'were small grants from UNEP and the UK-based David Shepherd Wildlife Foundation. Since then, funding for training, equipment and special operations has gradually been forthcoming from other donors and NGOs, including Norway, USFWS, Taiwan and IFAW'.²⁰⁰⁶

'It should be emphasized', writes Reeve, 'that, in addition to launching [the] LATF on their own funds, parties are providing core funding - a major achievement, given their limited resources'.²⁰⁰⁷ The LATF played a key role, she says, 'in the seizure in June 2002 of six tonnes of ivory smuggled from Zambia to Singapore, seen as the biggest achievement of the organization's short history'. She adds that the Lusaka Agreement initiative has, however, 'had a mixed reception in CITES'.²⁰⁰⁸ This was, however, 'almost certainly influenced by opposition to the agreement from a few southern African states, particularly Namibia and Zimbabwe, dating back to sub-regional divisions over the ivory trade and evident since the beginning of the initiative'. Botswana, Namibia and Zimbabwe, 'all strong proponents of the ivory trade', did not, she says, 'participate in the negotiations, despite invitations and available funding'. She then explains that at CITES COP9 'differing opinions spilled over in public' when Namibia raised objections to the 'underlying philosophy' of the agreement; and 'Lusaka Agreement states criticized Namibia for comments that were misrepresentative and factually incorrect'. Namibia and Zimbabwe, she concludes on this, 'have continued to oppose the agreement, although Botswana has shown signs of interest'.²⁰⁰⁹

²⁰⁰⁴ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 232-33.

²⁰⁰⁵ Article 18 of the Vienna Convention on the Law of Treaties is headed 'Obligation not to defeat the object and purpose of a treaty prior to its entry into force' and provides that '[a] State is obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed'. Vienna Convention on the Law of Treaties, 1969

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁰⁰⁶ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 232-33.

²⁰⁰⁷ *Ibid* at 234-35.

²⁰⁰⁸ *Ibid* at 234-35.

²⁰⁰⁹ *Ibid* at 234-35.

13.2.2 The SADC Protocol

Reeve records that, '[i]n the wake of controversy over the Lusaka Agreement, the Southern African Development Community (SADC) developed a Protocol on Wildlife Conservation and Law Enforcement (the SADC Protocol) and promoted it as an alternative for wildlife law enforcement cooperation'. The Protocol, however, has, she says, 'a much wider scope, addressing primarily cooperation in wildlife management and sustainable use' with '[t]s provisions for cooperation on wildlife law enforcement' being 'less specific than in the Lusaka Agreement'.²⁰¹⁰

According to the Protocol itself, its 'primary objective' is to establish 'common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement of laws governing those resources'.²⁰¹¹ In furtherance of this objective, specific objectives of the Protocol include 'promoting the sustainable use of wildlife'; 'harmonising legal instruments'; enforcing wildlife laws 'within, between and among States Parties'; facilitating information exchange; assisting in capacity building; promoting 'conservation of shared wildlife resources through the establishment of transfrontier conservation areas'; and facilitating 'community-based natural resources management practices for management of wildlife resources'.²⁰¹²

The Protocol, then, is very much a sustainable use agreement. Moreover, it was perhaps even created, at least partially, for the purpose of undermining the Lusaka Agreement in respect of the ivory trade.²⁰¹³

The Protocol was signed in Maputo, Mozambique, on 18 August 1999 by 14 states,²⁰¹⁴ including three that are also party to the Lusaka Agreement: Lesotho, Tanzania and Zambia. The Protocol did not come into force immediately. As of February 2001, per Reeve again, 'with ratification by two-thirds of the signatories being required for it to enter into force, only three countries - Botswana, Mauritius and Namibia - had ratified the Protocol'.²⁰¹⁵ Since then more have ratified, and the Protocol came into force on 30 November 2003.²⁰¹⁶

Reeve concludes that it is 'open to question' whether the development of the SADC Protocol 'was born from genuine commitment to cooperation, was a direct product of the Lusaka Agreement's opponents, or was simply politically expedient, given that some countries involved were pressing to sell their ivory stocks and needed to show a commitment to cooperative law enforcement'. Probably we shall never know for sure; and it may be, of course, that there was no one simple reason. At the meeting of the CITES SC41 in February 1999,

²⁰¹⁰ *Ibid* at 235-37.

²⁰¹¹ Article 4(1): 'Article 4: Objectives' Protocol on Wildlife Conservation and Law Enforcement <http://www.sadc.int/english/documents/legal/protocols/wildlife.php>. See (n 1175).

²⁰¹² Article 4(2)(a)-(g) *ibid*.

²⁰¹³ See 13.1.3 and 13.2.1; also (n 1098).

²⁰¹⁴ Angola, Botswana, DR Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe. 'Status of Protocols' <http://www.sadc.int/english/documents/legal/protocols/status.php>.

²⁰¹⁵ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 235-37.

²⁰¹⁶ The countries which have ratified, with their dates of ratification, are: Botswana (February 2000), Lesotho (May 2002), Malawi (May 2001), Mauritius (January 2000), Mozambique (June 2002), Namibia (January 2000), South Africa (October 2003), Tanzania (May 2002), Zambia (January 2003); see 'Status of Protocols' <http://www.sadc.int/english/documents/legal/protocols/status.php>.

Reeve records, 'Botswana, Namibia and Zimbabwe all put forward their involvement in developing the SADC Protocol as evidence of their commitment to a mechanism like the Lusaka Agreement' - this being 'one of the prerequisites to obtaining Standing Committee approval for sale of their ivory stocks'.²⁰¹⁷

South Africa is, therefore, a member of two significant regional instruments dealing with enforcement - the Lusaka Agreement on enforcement of conservation laws and the SADC Protocol on the conservation of wildlife and enforcement of conservation laws. The two Agreements have markedly different histories and, arguably, approaches, but both are of direct relevance to the international management of the ivory trade. If it is to present a consistent and coherent view on conservation, South Africa will need in the future to reconcile its approaches under the two.

²⁰¹⁷ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 235-37. Reeve notes that '[t]his was accepted by the Secretariat and Standing Committee, even though the protocol was in draft form and quite different from the Lusaka Agreement'. *Ibid* at 235-37. See [5.3.9](#).

14 Different sensibilities

14.1 The Oriental and Occidental palates

14.1.1 *The gap*

There are several extremely wide rifts, or gulfs, in understanding between different protagonists in the conservation debate. Likewise, on the international plane, there is an enormous gap in understandings between - put crudely - East and West.

Watson writes scathingly that '[i]t's all well and good to preach the save-the-whales message to 300 million North Americans: they aren't killing whales'.²⁰¹⁸ According to Chadwick, '[i]n Bangkok, people can still order a feast with an Asiatic black bear or a sun bear as the centerpiece, bawling and screaming as it is slowly roasted alive over coals before the assembled guests'; or a restaurant 'will cater one of those affairs, known throughout much of the Orient, at which the top of a live monkey's skull is removed and the primate watches the diners scoop its brains out to eat'. We are, he says caustically, 'talking hard-core gourmet fare here in the Land of Smiles'; adding that '[s]ome Chinese dealers had orders out in Thailand for elephant penises' which makes '[s]hooting elephants for their tusks seems almost wholesome by comparison'.²⁰¹⁹ Perhaps there is a difference between a society that will import endangered foods from other countries, to the detriment of the species concerned, for no reason other than to satisfy a taste for the exotic; and a society that kills the same endangered species simply for subsistence. However, the lines do sometimes become blurred. While Chadwick criticises an Oriental taste for food that involves unnecessary suffering; such criticism makes it difficult to answer the Japanese charge that Japanese whaling is for food, that no parts of a whale are wasted, and that historically it has been the West that used no parts of whales for food and which has wasted the parts of whales that they did not intend to use.

Different sensibilities abound, then. How to breach these gulfs in understandings, empathies and cultural practices may be the greatest challenge conservationists face in the 21st Century.

14.1.2 *Whaling in Japan*

It seems that there is enormous variety too in the historical claims made about past usages of whales. Burton, writing in 1973, comments that '[a]fter the war years there was a market for whalemeat for human consumption in western countries but it never became popular and it is now fed to animals'²⁰²⁰ ... [i]n Japan, however, whalemeat is used in several forms and it is shipped back to Japan in refrigerator ships'.²⁰²¹ Day writes that 'predictably, the end of the hunting of most of the great whales resulted in increased pressure being put on the smaller cetaceans: pilot whales, dolphins and porpoises. In some instances, these are now being sold in Japan as whale substitutes, or even misleadingly labelled as 'small whale meat'.²⁰²² According

²⁰¹⁸ P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at 24.

²⁰¹⁹ D H Chadwick *The Fate of the Elephant* (1992) at 364.

²⁰²⁰ See 14.1.3, esp. (n 2047), on recent denials that whale meat has been fed to animals.

²⁰²¹ R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 158.

²⁰²² D Day *The Whale War* (2nd ed, 1992) at 169.

to Victor, '[w]hales have not been the largest source of meat in the Japanese diet since 1963'.²⁰²³

At IWC 25, in 1973, the Japanese Commissioner said that 'we are convinced that whale resources are to be utilised through sound scientific management for the maximum benefit of human beings, as a source of human food and for many other useful purposes'. He then added that '[t]aking the world as a whole, whaling seems to have become a forgotten industry. However, whaling in Japan is still one of the most important means of providing the Japanese nation with its precious food protein'.²⁰²⁴

Japan, at IWC 46 in 1994, argued that by the year 2050 it is estimated that the world's population will exceed 10 billion. 'In order', suggested Japan's Commissioner in the Plenary Session, 'to maintain our populations' food resources in this rate of increase, if we are to acquire all the food resources from the land area, we must cut down the forests and make more room for the agricultural and pastoral lands, and this inevitably leads to the environmental destruction of the global scale'. 'According', Japan's Commissioner went on, 'to the statistics published by the FAO the total fisheries production of the world is 100 million tons'; yet, he argued, 'if the production is looked at in the scale of North Pacific area, the whales take the prey species as predator by the scale of 245 000 million tons'. The Commissioner then suggested that the world will eventually have to consider 'the poverty and shortage of nutrition and starvation suffered by the developing countries' population'.²⁰²⁵

In its written Opening Statement at IWC 54, in 2002, Japan said that '[t]he whale to the Japanese in ancient times was a kind of fish that was thought to be brave and great'; and that '[t]he total protection of all whales irrespective of their stock status as promoted by some members of the IWC and some NGOs is contradictory to Japanese cultural values where whale meat is still eaten and where whales are still revered through religious ceremonies and festivals'.²⁰²⁶

Japan is, strongly arguably, a menace to global fisheries; since the country is seemingly insatiable in its appetite for products of the sea, and because it seeks these in many waters other than its own. Although the Japanese fishing effort may not by itself overfish on a global scale, to give it the benefit of the doubt; numerous other countries benefit from being able to sell sea products to Japan. This implies also, of course, that blame is to be shared by all of the countries involved - and even by those which do nothing to control those countries that overfish.

According to Clover, 'Tsukiji is more than a market',²⁰²⁷ it is a national shrine to what one of its wholesalers describes defiantly on its website as the 'inexhaustible sea'.²⁰²⁸ 'Every year since

²⁰²³ D G Victor 'Whale Sausage: Why the Whaling Regime Does Not Need to be Fixed' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 292 at 297-98.

²⁰²⁴ Mr I Fujita, Japan, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* at 25.

²⁰²⁵ Japan Commissioner IWC 'Report of the Plenary Sessions of the Forty-Sixth Annual Meeting' (23-27 May 1994, Mexico) *Verbatim Record* at 22.

²⁰²⁶ IWC 'Opening Statements of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki); written Opening Statement by: Japan (IWC/54/OS/JAP).

²⁰²⁷ Clover writes of Tsukiji Market in Tokyo that '[t]hey say that if it swims in the sea, it will end up here ..., the biggest fish market in the world. ... in a country that eats seafood for breakfast, lunch and dinner, and out of intricate vending machines between mealtimes'. C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 19-20.

²⁰²⁸ *Ibid* at 19-20.

the 1960s', he continues, 'the US's eastern seaboard fishery has taken more bluefins from the threatened west Atlantic population than scientists say is right. ... Ironically enough, a fish regarded as over-exploited in every ocean where it swims is in oversupply'; with there being too many fish on the market and too few in the ocean.²⁰²⁹ An attempt, he adds, 'to list the bluefin tuna was made by well-meaning, conscience-stricken Sweden - a country that has lost its bluefin run altogether - in 1992'; with the proposal being that of a listing under Appendix II.²⁰³⁰ Clover says that 'there is a compelling argument that bluefin ought by now to be protected by stringent quotas and rigorous controls on trade' under CITES; and he argues that the species 'would be listed under CITES already, but for some disgraceful politicking by the United States and Japan in 1992, when Sweden proposed protecting it and was humiliatingly rebuffed'.²⁰³¹ This implies that the United States and Japanese practice the politics of expediency - even joining forces when it is in their interests to do so; as at the IWC Special Meetings of 1977, 2002 and arguably at the IWC 59 in 2007.²⁰³²

Komatsu and Misaki write that '[w]hales are a wonderful gift from the sea' and that '[t]hey are among the most favourite of the marine food supplied to Japanese people and are traditionally an important food resource'.²⁰³³ The same authors add that '[w]haling today, and in the future, will be for food, not oil'. They argue that 'Japan is highly attuned to issues of sustainability'; giving as an example the fact that 'Japan took the initiative to impose restrictions on the tuna fishery after problems were identified with the conservation of the global tuna fishery'.²⁰³⁴

What can be said in reply, if this is what is believed? It is extremely depressing for the environmentalist - where States have hardened their attitudes and beliefs, what can be said or done to persuade them otherwise, or to reconcile views?

Komatsu and Misaki suggest that 'Japan appears to be singled out on the whaling dispute'. They claim that the 'true reason other nations gave up pelagic whaling was because it ceased to be economically viable - although these countries may not admit that this was the reason'.²⁰³⁵ In summary, they argue, 'Japanese whaling is the complete rational utilization of the whale while Western whaling was wasteful'.²⁰³⁶ They then contend that '[t]here is another factor that singles out Japan in the whaling issue, and it is a racial one'; with Japanese believing that because they are 'non-white,' racial discrimination is 'a hidden agenda of the anti-whaling powers' with the 'imposition of Western values on Japanese' being 'cultural imperialism'.²⁰³⁷ Furthermore, they say, 'the Western arrogance is underscored by the double standard of allowing the American natives to hunt endangered Bowhead whales on the one hand while prohibiting the Japanese small-type whalers to catch abundant minke whales'; concluding that the 'category of Aboriginal Subsistence Whaling is a way to get away with the discriminatory treatment of the minorities'.²⁰³⁸

²⁰²⁹ *Ibid* at 22-27.

²⁰³⁰ *Ibid* at 22-27.

²⁰³¹ *Ibid* at 164-65.

²⁰³² See 3.2.4, 3.2.6, 3.3.10, and 3.3.25 to 3.3.34.

²⁰³³ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 6-7. See (n 1920).

²⁰³⁴ *Ibid* at 21.

²⁰³⁵ *Ibid* at 23-25.

²⁰³⁶ *Ibid* at 23-25.

²⁰³⁷ *Ibid* at 23-25.

²⁰³⁸ *Ibid* at 23-25.

It has been argued that (at least certain) Western countries did, at times, make more use of whale carcasses than they are given credit for by Komatsu and Misaki.²⁰³⁹ This must not be allowed to obscure the fact, however, that the West has created a situation where it can be charged with hypocrisy. While the West cannot ‘undo’ its past whaling practices, and while it might argue that it has come to a new understanding of whales which the Japanese ought to adopt; what it can do, in practice, is to approach the matter with greater understanding of the Japanese position and ensure at the very least that its behaviour in the 21st Century is beyond reproach.

The position becomes even more complicated when one looks further into the Japanese attitude toward utilisation of animals for food, and of whales in particular. Komatsu and Misaki write that ‘[Western p]eople would rather not know where their food comes from’; and that, in contrast, ‘[t]here is a customary Japanese prayer said before a meal, *Itadakimasu*’ which ‘is an expression of gratitude for the very life of the creature that has died for our survival’.²⁰⁴⁰ All killing of animals, they say, ‘is cruel, but there is no justice, no logic in condemning the killing of one animal by one people, while living off the killing of another’; and the ‘best that we can all do is to appreciate the life that has been surrendered, and not waste any part of it’.²⁰⁴¹

Yasunaga writes that there are historical records of memorial services for whales being conducted; both after significant takes of whales and at the ends of whaling seasons. According to the writer, such services reminded people that ‘people should not forget that they make their living by taking the lives of whales, ... [and] that there is no difference between the life of a small fish and a large whale’.²⁰⁴² According to the same writer, ‘there remain in Yobuko as many as four memorial towers for whales that had been set up in the Edo period’.²⁰⁴³

Hayashi suggests that it is a misunderstanding of Japanese Buddhism to suggest that Japanese people ‘hardly ever ate animal meat after the introduction of Buddhism’. It does seem, though, that during the Edo Period the rulers did attempt to suppress the eating of meat; and Hayashi suggests that this had something to do with social control - ‘the notorious policy of Tsunayoshi (1646-1709), the fifth Tokugawa shogun, to protect dogs and other animals can be considered as a measure to ensure a stable Shogunate, together with the Ordinance on Kanto Firearms Control issued by Ietsuna (1641-80), the fourth Tokugawa shogun, which prohibited farmers to own or use firearms’. ‘Against such a backdrop’, continues Hayashi, ‘whale hunting developed as an industry producing fish meat (in fact, animal meat) that was welcomed by both the rulers and the people of the Edo period’.²⁰⁴⁴

Iino and Goodman agree; writing that ‘[f]rom a Japanese perspective, whales are valued marine resources that should continue to be used as a source of food, provided that the stocks are

²⁰³⁹ S Martin *The Whales’ Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 154; 158; 176; 195.

²⁰⁴⁰ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 154.

²⁰⁴¹ *Ibid* at 155.

²⁰⁴² H Yasunaga ‘Pre-modern Whaling in Yobuko and Ogawashima Island’ in Institute of Cetacean Research and Japan Whaling Association (eds) *The 3rd Summit of Japanese Traditional Whaling Communities: Report and Proceedings 30 May 2004* (2005) 69 at 81.

²⁰⁴³ *Ibid* at 81.

²⁰⁴⁴ Y Hayashi ‘Man and Animals - the Significance of the Edo Period’ in Institute of Cetacean Research and Japan Whaling Association (eds) *The 3rd Summit of Japanese Traditional Whaling Communities: Report and Proceedings 30 May 2004* (2005) 107 at 107-108.

robust enough to support sustainable whaling'.²⁰⁴⁵ Komatsu and Masaki continue; writing that '[w]hen one does something by tradition, one is unlikely to deeply question it', and that, with the eating of whale meat being 'ingrained in the Japanese tradition,' the concept of 'cruel killing' is 'not really one that enters the Japanese mind'. Neither, they argue, 'is it one that enters the Western mind, when contemplating the beast that met its fate in a slaughterhouse to provide them with beef or lamb'. However, they point out, '[r]ather than any thought of cruelty, the Japanese have the concept of the offering of a life, a Buddhist-inspired appreciation of the life sacrificed that we might survive'.²⁰⁴⁶

14.1.3 Science and whaling; and the FAO

Further to the charge that whaling is not really necessary, except as a luxury foodstuff, it has been suggested that much of the whale meat imported into Japan is in fact wasted. This has been denied by Japanese officials. In February 2006, the Japanese Institute of Cetacean Research (ICR) said that 'a minuscule amount of whale by-product caught through Japan's research programs in the Antarctic and western North Pacific or residuals from non-IWC regulated whaling ends up as pet food'.²⁰⁴⁷

According to the same institute, there is very strict control over what happens to the byproducts of scientific whaling; and that '[t]he distribution of frozen whale meat from the research programs is highly regulated'. The explanation is given that the 'price range that Japanese consumers are expected to pay is set by the Government and the supply to the market is kept under tight control and drip fed to ensure that whale meat is available in selected areas throughout the entire year'. Demand, it is said, 'always exceeds supply' and, '[a]t any given time, there will be an amount of whale meat in storage to ensure supply is always available'. The Japanese, it is concluded, 'are not losing their taste for whale'. It is then explained that the 'wholesale price of minke whale red meat is set at a fixed price of 1950 Yen per kilogram'; the whale meat 'from the western North Pacific research' being 'available to the public from mid-December onwards'. One Dr Hatanaka is then quoted as saying that 'anti-whaling lobbyists are told when the catch reaches storage and coincide their public relations campaign to falsely allege the augmented supplies mean whale meat is not in demand because there is a large amount of it'.²⁰⁴⁸

It may be that more consideration *does* need to be given to the relationship between whales and other fisheries, in the context of food resources. M'Gonigle suggests that '[t]he FAO has always had a special relationship with the IWC, and it was even argued in 1946 that the Commission should affiliate with the emerging United Nations system by being subsumed within the FAO'.²⁰⁴⁹ Birnie agrees; writing that the 'FAO has often been identified as a UN

²⁰⁴⁵ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 7-8.

²⁰⁴⁶ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 105-06.

²⁰⁴⁷ 'Whale Meat is for Human Consumption Almost in its Entirety' *JWA News* No. 13, March 2006 http://www.whaling.jp/english/news/jwa_news_13.pdf (accessed 7 June 2006). See (n 2004). As an example of the allegations made, see *Reuters* 'Japan using whale meat for dog food: report' *ABCNews.online* 11 February 2006 <http://www.abc.net.au/news/newsitems/200602/s1567589.htm> (accessed 7 June 2006). *Reuters* was drawing from a UK-based NGO, the Whale and Dolphin Conservation Society (WDCS).

²⁰⁴⁸ *Ibid.*

²⁰⁴⁹ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 133.

Specialised Agency with which the IWC could be more closely affiliated in order to attract more widespread global interest and participation in the policies of the IWC'.²⁰⁵⁰ She continues, recording that in 1946 it was proposed - in the US Draft - that the IWC be an autonomous body within the FAO framework and 'several advantages were alleged to accrue from this proposal'. It is 'pertinent', she then argues, 'to discover why the incorporation of the IWC into the FAO framework was rejected by the Washington Conference'; and explains that the US 'strongly supported its own proposal' but other states disagreed. The UK apparently felt that 'at the FAO Conference the main item on the agenda was not fisheries but agriculture and expressed the fear that whales would therefore be a low priority on the agenda;' while The Netherlands suggested that 'the Convention, but not the Commission, should be affiliated to the FAO'. The USSR '(which had at a late stage finally joined the Conference) objected to the coordination of the IWC and FAO' on the ground that 'some countries that were members of the former were not members of the latter'.²⁰⁵¹

According to the Secretary of the IWC, in 1949, 'when we started the Washington Conference there was quite a clear-cut proposal that any whaling commission - in fact that the whole of whaling operations - should be brought within the ambit of FAO'.²⁰⁵² As a compromise, it was decided at the time that the Parties would decide within two years of the ICRW coming into force whether to bring the Convention into the framework of a specialised agency related to the United Nations.²⁰⁵³ The Observer from the FAO did respond with the words '[w]e are all working towards the same goal, and I would like to extend the best wishes to the oldest, but at the same time the newest, of the international organisations, which is the [IWC] ... [w]e are all working for the same purpose'.²⁰⁵⁴ It is, of course, interesting that although some, if not most, commentators seem to agree that the creation of the ICRW concerned oil rather than food; there were those who saw whales as a food resource from the inception of the Convention - and that the US may have been amongst these.

This represents yet another example of an irony in the United States's approach to the IWC - that the US initially proposed that the IWC and the FAO be linked. Today, of course, the US is opposed to this linkage; given that it is the pro-whaling states which argue that whales should be considered a food source, and their interrelationships with other species studied in this regard.²⁰⁵⁵

At IWC 34, in 1982, the FAO Observer argued along the same lines as the Japanese Commissioner; stating that '[t]he continuation of commercial whaling can also be threatened by management measures that are too restrictive. The most extreme example is a moratorium on all whaling. This is a completely unselective measure'.²⁰⁵⁶

²⁰⁵⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 182.

²⁰⁵¹ *Ibid* at 185-187.

²⁰⁵² IWC Report of the Plenary Session (from 30 May 1949) *Verbatim Record* (First Day) at 24.

²⁰⁵³ *Ibid* at 24.

²⁰⁵⁴ IWC Report of the Plenary Session (from 30 May 1949) *Verbatim Record* (Final Day) at 6. It does seem that from 1964 until 1969 the FAO carried out whale stock assessments on behalf of the IWC. *Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume 1* (1978) at 42.

²⁰⁵⁵ Interviewed, Donovan told the present writer that the relationship between the IWC and the FAO currently occurs mostly at the scientific level. *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

²⁰⁵⁶ Statement by the FAO Observer, IWC 'Opening Statements of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton).

Those who argue - and there are many - that the Japanese are illegally supplying their populace with whale meat are clearly not correct. As Lapointe phrases it, 'Japan does not even have a choice' as 'the text of the ICRW specifically requires that meat collected from research program be processed'. Ironically, he says, 'governments and NGOs accusing Japan of selling whale meat resulting from scientific research are, in fact, accusing Japan of fulfilling its obligation under the Treaty'.²⁰⁵⁷

Arguably, though, if the charge is made that the Japanese scientific whaling effort is a sham designed to put whale meat into Japanese restaurants; then this would be an abuse of the principle of non-wastage that must lie behind the requirement that whale meat be consumed, when it is a by-product of scientific research.²⁰⁵⁸

It *has* of course been so suggested - that scientific whaling is a sham. This has been denied, however. Komatsu and Misaki write that '[w]asting resources is not compatible with our heritage'; and that '[n]obody has a right to condemn the rational utilization of the by-products, but that is what the anti-whaling proponents are doing now'. Furthermore, they add, these anti-whaling activists 'are asserting their accusations on Japan, saying that the sale of the by-product from the research' provides the 'hot-bed' for the distribution of illegal whale meat. To prevent this, they explain, 'Japan has developed a complete DNA inventory of individual whales caught in the research program and those caught in nets'; and that it 'is now possible to track down the illegal whaling operators so that stringent penalties are imposed upon them'.²⁰⁵⁹

Japan, it seems, is continuing to jump through every hoop - as well as to crawl through every loophole.²⁰⁶⁰

14.1.4 Perceptions of Japan and of whaling; and Japan's attitude to nature

Komatsu and Masaki contend that '[t]he whale was enshrined as the icon of environmentalism';²⁰⁶¹ yet '[f]ew people knew that some whale stocks were healthy [and] every school child was brainwashed with the idea that mankind had exploited whale species to the point where there were only a few whales left in the ocean'.²⁰⁶² When the United States, the authors say, 'abruptly proposed at the Stockholm Conference a 10-year moratorium for commercial whaling, some speculate their secret agenda was to divert attention from environmental destruction caused by chemical defoliants in Vietnam'.²⁰⁶³

²⁰⁵⁷ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 116. See Article VIII of the ICRW, Annex A.

²⁰⁵⁸ See 8.2.

²⁰⁵⁹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 144-145.

²⁰⁶⁰ See (n 907) and (n 2274).

²⁰⁶¹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 87-88.

²⁰⁶² *Ibid* at 87-88. The same writers argue that '[s]aving whales won't cure any other environmental problems. Even if the depleted stocks were saved, other problems still remain to be solved'. *Ibid* at 87-88. While this is certainly true, it is not a reason *not* to save whales - there are many compelling arguments for doing so; not the least of which is that having an icon, a standard behind which to rally, might be very useful.

²⁰⁶³ *Ibid* at 87-88. This linkage is certainly far-fetched, but it is useful to see that commentators do try to draw such links in the murky world of international law and politics.

The charge, therefore, is once again that the United States acts in its own interests - and that US politics is fraught. The suggestion here is that the country, or at least its successive governments, gain domestic kudos whilst losing nothing. The same suggestion has been made in respect of France; that a country can appease its electorate by appearing to be doing much to protect the environment, while in fact picking as its causes only those areas in which it does not actively engage.²⁰⁶⁴

Along the same lines as asking why the US throws so much energy into an issue, an industry, in which it is not actively engaged; so it can be asked why the issue is of such importance to Japan. In the words of Iino and Goodman, '[m]any commentators question why the Japanese are so adamant about the right to whale when whaling does not contribute significantly to GDP and whale meat is no longer a significant part of the diet of most Japanese'; explaining that the 'short answer is that it is a matter of principles'.²⁰⁶⁵ This suggestion in fact enhances the point made directly above by the present writer; that the things that are at stake are the symbolism of the whale, and the pride, stubbornness and self-interest of States.

Friedheim suggests that '[t]o force Japan out of whaling seems to Japanese another measure to reduce their independence and create a sense of dependence on outside food sources' and that it is, therefore, '[l]ittle wonder they have been stubborn'. At the same time, however, Japan has - Friedheim argues - 'always bargained sincerely'; giving as an example 'the fact that they did not vote strategically on American requests for an aboriginal quota'.²⁰⁶⁶ Unfortunately, this suggestion of sincere bargaining ignores the events (which give the lie to it) surrounding the bowhead whaling controversy in the late 1970s; and, being published in 2001, precedes the events of the May 2002 blocking of the renewal of aboriginal bowhead whale quotas ... at which point Japan most certainly *did* 'vote strategically'. 'When [Japan] promised', continues Friedheim, 'to do something, they did it'; and, '[i]n short, if they agree, they have a good implementation record'.²⁰⁶⁷ 'The very close relationship', Friedheim continues, 'between the government and the major Japanese fish-trading and processing companies guarantees that if the government agrees to a Southern Ocean regime, which limits the scope of Japanese activities, it will be with their consent and that of the Japan Fisheries Association'.²⁰⁶⁸ This contention further ignores the possibility that Japan never did intend to abide by the 1982 moratorium to which they agreed - in they sense that the country may have agreed to the moratorium in the knowledge that it would be able legally to rely instead on scientific whaling, until the moratorium could be overturned.

According to Chadwick, worth quoting at some length, '[l]ately, conservationists had put a lot of effort into trying to analyze the Japanese view of the living world'; asking questions such as:

²⁰⁶⁴ See (n 398) and (n 450). The charge has also been made of Western governments generally; see, for instance, J Vidal 'Death on the high seas' *The Guardian* 19 October 2006

<http://environment.guardian.co.uk/conservation/story/0,,1925584,00.html>, where he writes that '[f]or most [W]estern governments with active animal conservation groups, being on the side of the whales is the one time they can be seen to support green activists. Indeed, the genuine passion with which the British and American governments have fought to maintain the whaling ban is only matched by their deep ambivalence about green issues in many other international meetings'.

²⁰⁶⁵ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 8.

²⁰⁶⁶ R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 328.

²⁰⁶⁷ *Ibid* at 328.

²⁰⁶⁸ *Ibid* at 329.

‘[w]hy was this nation so willing to keep accumulating ivory when to do so was to visit disaster upon elephants?’. Other questions which Chadwick suggests are asked include ‘[w]hy was it continuing to lead the way in knocking down the globe’s tropical rainforests for hardwood, threatening the richest of all terrestrial ecosystems, whose residents include both elephants and native peoples?’; and ‘[w]hy was Japan still attacking great whales, dolphins, and sea turtles ... and ... while it was at it, the rest of the open ocean community, first through its huge fishing fleets and factory ships and secondly through drift nets, mile-long curtains of death hung vertically from floats and loosed to sweep through the sea wherever currents carry them, tangling and killing everything in their path?’. Aren’t these the people, asks Chadwick, ‘who strive for the perfect expression of a dragonfly in a brush stroke? A moonrise through plum blossoms in haiku verse? Don’t they teach courses to pass on venerable techniques of flower arranging? Isn’t Japan where Zen monks might sit for hours by a stream contemplating the pattern of moss on stone?’.²⁰⁶⁹

Continuing, and attempting to provide answers, Chadwick writes that ‘Japan is indeed synonymous with an extremely refined appreciation of nature’; however, ‘the operative term here is not nature but extremely refined, as epitomized by the stunted, root-starved, strapped, and carefully twisted little trees called bonsai’. Wild things and places, he continues, ‘apart from the human sphere are something else again’; and ‘Japanese culture has not traditionally accorded them much sympathy or respect’. Then again, he concedes, ‘neither has the West’. Judgments about other societies, Chadwick adds, ‘are dangerous to make and rarely fair, so I would be glad to avoid going beyond what I’ve already said’. ‘Besides’, he concludes, ‘I really don’t think I need to’; his argument being that ‘Japan is placing exceptional pressures on the biosphere just now not because of some rapacious streak in the national character, and not because its citizens are exceptionally greedy, but simply because the Japanese are humans and their country has an exceptional concentration of capital and technology at the moment’.²⁰⁷⁰

As illustration, however, of the gulf of understanding with which the discussion in this section began; one can consider the views of Professor Akio Morishima, whom the present writer interviewed. Questioned on the role of Buddhism in the debate; Morishima answered that in Buddhism ‘all animals are respected - fox, bear’. He then suggested that the Japanese ‘use all parts of [the] whale’ and that the whale is ‘not very special’.²⁰⁷¹ Questioned as to the concept of nature in Japan, with the present writer putting it to him that the bonsai tree represents an ‘unnatural and overly refined’ view of nature; Morishima explained that ‘Japanese gardens [are unlike] European gardens’. In his words:

we don’t cultivate gardens as Europeans do. We don’t line trees. Put it in a natural way. Take nature as it is. Bonsai is nature’s way - We don’t see humans as having a special existence - humans are like dogs. We are part of nature. Traditional perspective. Born from it, come back to it. We might be a dog in

²⁰⁶⁹ D H Chadwick *The Fate of the Elephant* (1992) at 221-222.

²⁰⁷⁰ *Ibid* at 222-223. Chadwick argues that ‘Japan is only doing what the United States did as it spearheaded the Industrial Age, what Europe did during its colonial Age of Empire, and what the Moghuls and China and Rome each did in their respective heydays, when they had the edge in money, organization, and know-how’. *Ibid* at 222-223. Later in his book, Chadwick comments that: ‘[a]ccording to the Worldwatch Institute, in 1990 Japan imported 45 percent of the globe’s tropical roundwood, or unprocessed logs, 89 percent of which had come from Malaysia and Indonesia. Throwaway concrete forms. Throwaway lunch boxes. Throwaway chopsticks. These are the top three uses of tropical broad-leaved hardwoods - the softer, more porous-grained hardwoods - in Japan. I’ll repeat that: disposable concrete forms, disposable lunch boxes, and disposable chopsticks. While I’m at it, I’ll repeat the main uses of elephants in the world: signature seals, jewelry, and tourist trinkets’. *Ibid* at 407.

²⁰⁷¹ Prof. Dr. Akio Morishima, founder of the environmental law programs of Sophia University. Laureate of the Elizabeth Haub Prize in Environmental Law, chair of the Environmental Council for the government of Japan.

future. If I live a good life, could have a good future life. Cycle. Even the mountain or stone could have a life. Don't have one god. We don't have an idea of nature conservation because we are part of nature. Harmonise with nature. Should not enclose selves and separate ourselves from animals. To survive, humans must harmonise with nature.²⁰⁷²

'Understand', he continued, 'why we have bonsai. Bonsai is *not* artificial - we don't like very artificial nature. Stay in small inn - from your room can see surrounding hills and it's a part of the nature. When look at the bonsai, it's just taking that scenery into your room - miniaturising all landscape into your life. British/French gardens - when I saw them for first time I wondered why they made them so artificial'.²⁰⁷³

If the opposed camps in the 'preservation' versus 'conservation' war are ever to be brought together, there will need to be middle ground found as to the perceptions which each camp holds of the value of nature. At present, however, it seems unlikely that there will be agreement reached any time soon - so vast are some of the differences.

14.2 The United States and environmental protection

14.2.1 *The historical role*

The United States does not have an international environmental record to boast of - or does it? In recent times it has been something of a polecat,²⁰⁷⁴ but arguably the US is responsible for many of our current international environmental treaties. It was arguably, also, the United States that introduced the concept of 'wilderness' to the world. The early protection of Yosemite Valley (first protected in 1864, proclaimed as Yosemite National Park in 1890) and Yellowstone, which became the world's first national park in 1872, evince this pioneering role.²⁰⁷⁵

Glavovic writes that '[i]t is generally recognised that the United States has played a leading role in the management of renewable resources such as forests, rangelands and wildlife, not only in terms of management of its own resources, but also in the development of principles, policies and programmes which have frequently been followed by other nations'. In the early 1970s, he explains, 'the United States provided leadership in international environmental and resource deliberations - it played an important role in establishing the United Nations Environment Programme, in securing the Washington Convention [CITES] and other international agreements, and in calling world attention to environmental concerns'; and '[p]ublic and private sectors in the [US] have acquired much expertise and information on environmental protection and resource management'. Glavovic then quotes Frome²⁰⁷⁶ as expressing the leadership role of the United States as follows:

[t]here is no doubt that the world looks to the United States for leadership and for direction in the development of rational, responsible, ethical and moral policy to protect nature. Since the establishment of Yellowstone in 1872 as the first national park anywhere on earth, we have been regarded as the trail-

²⁰⁷² *Personal communication*: Interview with Prof. Dr. Akio Morishima, Nairobi, 7 October 2004; E Couzens.

²⁰⁷³ *Ibid.*

²⁰⁷⁴ See (n 2080).

²⁰⁷⁵ P D Glavovic *Wilderness and the Law* (1995) at 181-182.

²⁰⁷⁶ M Frome *Battle for the Wilderness* (1974); per Glavovic.

blazers of preservation. That reputation has been sustained through one pioneering action after another in defence of forests, wildlife, parks, soils, water, air - and wilderness.²⁰⁷⁷

Writing of both the ICRW and CITES; M'Gonigle suggests that 'the United States [] brought to fruition a decade of activity by the [IUCN]'. In 1963, he records, 'the IUCN's General Assembly had begun to draft a preliminary treaty aimed at controlling international trade in wildlife'; but it 'was only with the active cooperation of the [US], however, that a conference on this matter was held' with the result of this being CITES. The policies established at CITES, M'Gonigle continues, 'were immediately implemented in the United States through enactment of the Endangered Species Act of 1973'. He then advises that '[t]his intensive legislative activity in the United States presaged much of the content of the IWC agenda for the entire decade of the seventies; the moves for a moratorium and adoption of the New Management Procedure, for the enforcement of conservation regulations and restrictions on trade in whale products, and for revising the 1946 Whaling Convention itself all were initiated within this country'. 'No other nation', he concludes, writing in 1980, 'has had as great an impact at the Commission in recent years'.²⁰⁷⁸

14.2.2 *The modern role*

In many ways it can be seen as incredibly sad that the world's most powerful country has so abdicated the chance to play a leading role in global environmental protection.

Sands writes that '[the US]' approach to the [International Criminal Court] is symptomatic of a more generalized opposition to international rules and to multilateralism, and reduces the effectiveness of raising legitimate concerns'.²⁰⁷⁹ He continues, commenting that he finds it 'curious that it is no longer permissible' in the US, committed as it purports to be to 'the rule of law', to 'trumpet compliance with global rules'.²⁰⁸⁰

Lapointe contends that '[d]uring year 2000, [] US President [] Clinton issued a statement from the White House pledging his Administration's intention to block all attempts by African nations to derive economic benefit from their wildlife resources'; with the President's 'opposition to proposals to reopen trade in elephant ivory' being issued 'as the first week of the 11th meeting of the [COP] to CITES drew to a close at the UNEP headquarters, Gigiri, Kenya'.²⁰⁸¹ Although it is not possible to imagine Clinton committing political suicide by using these words in a direct quote, and it is clearly an interpretation by Lapointe which should be

²⁰⁷⁷ P D Glavovic *Wilderness and the Law* (1995) at 207. Sands writes that '[t]hroughout the 1970s and 1980s the United States stepped up global efforts to protect the environment. It joined a raft of new global instruments on endangered species, oceans and fisheries. Then a new environmental threat emerged, requiring a truly global response on a vast scale. The ozone layer ... The [US] led international efforts to address the problem, ... and in 1985, after five years of tortuous negotiations, much delayed by sceptical Europeans, more than 130 countries adopted a global convention ... The Montreal Protocol has now been ratified by almost every country in the world. ... The Montreal Protocol is frequently hailed as an international instrument which will be effective: American legal creativity and political muscle helped to make it a truly global instrument'. P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 75-76.

²⁰⁷⁸ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 189-190.

²⁰⁷⁹ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 47-48. Per Sands, '[a]lthough Bill Clinton signed the Statute, the Bush Administration, since it came into office in January 2001, has been running a aggressive, mendacious and ill-informed campaign to undermine the ICC'. *Ibid* at 47-48.

²⁰⁸⁰ *Ibid* at 98. The US has failed, as yet, to ratify UNCLOS (see [Annex D](#)), the CBD (see [15.2](#)), or the 1997 Kyoto Protocol to the 1992 Framework Convention on Climate Change.

²⁰⁸¹ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 121-122.

treated with great caution, what seems clear is that the attitude of the United States was opposed to that of the Southern African states - and that a preservationist line was to be taken.

Lapointe writes that '[d]uring CITES' first decade, the United States was perceived as a major leader in world conservation practice'.²⁰⁸² Typically, he says, 'during international meetings or bilateral interactions, the [US'] policy and direction were considered to be a world model for the pragmatic approach to conservation debates'; but the 'decade of the 1980s saw an erosion of this position of leadership, primarily due to changes in philosophy and a tectonic shift in political behavior'. The change in the US' approach, he says, 'to conservation policies became so extreme that past achievements were overshadowed and rendered obsolete'. He explains that '[b]y 1989 and 1992 CITES meetings, governments of other Member States noticed significant changes in [US'] conservation policies and positions on CITES issues'; and that, '[f]rom that point on, they began to actively question[] the style, methods, and goals of the United States'. This erosion of respect has apparently 'continued unabated' with, in 1994, 'the American leadership at CITES' seeming to have 'collapsed entirely'; and, at the 1997 CITES meeting, 'many Member States' making 'statements of outright dislike and disrespect for the US'.²⁰⁸³

As well as describing this shift in mood toward the United States; Lapointe offers an explanation for it, writing that '[s]ince 1988, there has been growing international recognition that the US has used conservation issues as a political and diplomatic lever to achieve goals that are completely extraneous and irrelevant to global conservation'.²⁰⁸⁴ Lapointe then proceeds to argue that the US' position at multilateral environmental agreements is a cynical one, driven by self-interest.²⁰⁸⁵ 'Natural resource researchers', he writes, 'find it increasingly difficult to explain and defend the recent official behavior of the United States at CITES'. A credible explanation remains elusive, he says, 'if one tries to view American positions purely in the context of biological considerations'; with 'many of America's national conservation policies and decisions' in recent years having 'been based on biologically irrelevant economic and political considerations'. He explains that US' 'support for member nations' conservation initiatives at CITES has commonly been offered or withheld as an integral part of external trade agreements'; and that, sometimes, 'other nations' conservation policies have been held hostage to demands involving American foreign aid grants to those countries'. Similarly, he adds, 'trade considerations may be brought to bear on countries to force them to take conservation positions favored by the [US]'. Political pressures, says Lapointe, 'may also diminish the scientific approach to sustainable use of natural resources'; with '[w]ell-funded animal rights and extreme environmental groups' commonly applying 'political pressure to official[s] at all levels of the US[] Government', through either 'direct financial support or threat of adverse publicity, even lawsuits'. In this manner, he argues, 'these organizations are able to project their unscientific approaches to wildlife management on a global basis'. His conclusion is that the US has been 'the unfortunate target of animal rights demands' and, in 'order to protect its reputation from adverse animal rights-generated media attention', US conservation policies

²⁰⁸² According to Lapointe, '[t]he United States played such a large part in the establishment of CITES as a major international conservation treaty that it has, in fact, been known worldwide as the Washington Convention'. *Ibid* at 136-139. Lapointe gets this point wrong, however; CITES is called the Washington Convention because it was signed there.

²⁰⁸³ *Ibid* at 136-139.

²⁰⁸⁴ *Ibid* at 136-139.

²⁰⁸⁵ *Ibid* at 136-139.

‘have mirrored the animal-rights protectionist philosophy, rather than principles of sustainable use and respect for other cultures’.²⁰⁸⁶

Lapointe does conclude, however, that the United States might be changing its stance.²⁰⁸⁷ The year 2007 certainly promised to prove an interesting one for the United States - with the IWC meeting in May and CITES in June. In particular, it was anticipated that the IWC meeting might have seen a twist in policy from the US - it being immediately significant that the US, as host country for the IWC meeting, has chosen to host it in Alaska, the only place where significant whaling occurs in the US.

In late 2006, the present writer asked Herman Oosthuizen about the role of the United States in the IWC. Oosthuizen gave his opinion that the US ‘is in an extremely difficult position because of their aboriginal whaling’; and because it has ‘very huge NGOs opposing whaling’. He concluded, however, that the US is ‘very good in what they’re doing and I think they’ll probably do it extremely well in the end’.²⁰⁸⁸

In the end, however, there was no overtly dramatic change of stance by the US at IWC 59.²⁰⁸⁹ There remain, though, two States which dominate current international debate over the use of natural resources - the United States and Japan. The US has a strange position. From having been the driver of many of the important MEAs of the early 1970s, it has now arguably squandered its moral capital and become a political polecat in the international livingroom. Despite this, the country remains hugely powerful politically and economically, and it is seen by many as being the one country which could, if it chose, bring other warring parties together.

14.3 Japan and environmental protection

14.3.1 Japanese domestic law and politics

There is an important reason why the United States finds it more difficult than does Japan to act without hypocrisy in the international arena: as has been seen, the United States is riven by domestic differences. Japan, on the other hand, according to M’Gonigle ‘is free from domestic environmental constraints’.²⁰⁹⁰

‘Because Japanese industry has become increasingly involved in many international ventures with serious environmental ramifications’, explains M’Gonigle, ‘this matter is of great significance’. The country’s economic dependence on whaling is, he says, ‘quite minimal’ and ‘it is [] the structure of decisionmaking, rather than the industry’s contribution to the country’s economy, that explains Japan’s resistance to the massive international pressure that has been brought to bear on it’. He adds that the ‘close links between the whaling industry and government’ can be seen ‘in Japan’s choice of its representative[s] to the IWC’. He then advises that, ‘[i]n addition to the close relationship between senior government and corporate whaling interests’, Japan’s ‘prominence in world fisheries since World War II has given the

²⁰⁸⁶ *Ibid* at 136-139.

²⁰⁸⁷ *Ibid* at 136-139.

²⁰⁸⁸ *Personal communication* Interview with Herman Oosthuizen, Cape Town, 14 December 2006; E Couzens.

²⁰⁸⁹ See 3.3.25 to 3.3.34.

²⁰⁹⁰ R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 184-185.

industry enormous power in influencing government decisions'. His conclusion, published in 1980, is that '[i]n addition to this strongly economic foundation for governmental decisionmaking, the complete lack of domestic opposition to the industry contributes to the government's failure to be responsive to environmental concerns'.²⁰⁹¹

These suggestions, albeit describing the position in the late 1970s, go some way toward explaining the significance of whaling to the Japanese. A low level of interest within domestic constituencies combined with the importance of whaling as a symbol for a general approach to use of the seas.

The present writer interviewed Professor Akio Morishima in late 2004. Asked about Japan's approach to international environmental law generally and the ICRW/IWC in particular, he explained that in Japan 'before ratifying [an international convention], usually domestic law is prepared' and '[s]o the international convention itself has no enforceable power domestically, unlike in some countries'. Japan, he explains, is therefore 'not well-received internationally, because unless there's consensus domestically they won't join internationally' and 'so Japan is usually slow to sign'. 'Once they sign and ratify', he said, however, 'Japan has enforced law'.²⁰⁹²

14.3.2 Japanese attitudes toward whaling; and to nature generally

Asked about the attitude toward whaling inside Japan, Morishima said that in the 'case of whaling there's a strong promoter of whaling [e]ven though whaling is becoming a small thing'. He explained that it '[w]as one of the largest industries' but that 'after the 1950s and 1960s it has declined rapidly - [with] other protein sources [being available]'. Many people, he said, 'don't eat whale, but still have political power' and 'so, even *if* Japan thinks it might be wise to move to conservation - still there are *some* who insist on whaling'; and that 'whaling is a peculiar issue'.²⁰⁹³

This comment effectively supports the contention by M'Gonigle that it is a numerically small, but extremely powerful, lobby within Japan that continues to insist on whaling.

'In my personal opinion', commented Morishima, 'whaling is a symbolic issue that expresses a concept of Western philosophy'. He told me that a 'Californian American came to Japan and said only whales can understand humans'; but argued that this is a '[s]ymbol of Western belief', whereas 'Japanese people believe whale [to be] one of [the] animal[s], including humans, dogs' - and that '[w]e feel something [is] wrong with that kind of sentimental discussion'. He then explained, however, that he felt that 'very reasonably, I think the Japanese way is wrong - if scientists can prove whales *are* endangered and can discuss not philosophically'; but advised that, 'unfortunately', it is an 'unduly political issue in Japan - but less people are interested'.²⁰⁹⁴

Questioned as to Japan's role in CITES and the ivory trade, Western is critical. He describes there being a 'lot of corruption on their part' and explains that he 'actually saw Japanese

²⁰⁹¹ *Ibid* at 184-185.

²⁰⁹² *Personal communication*: Interview with Prof. Dr. Akio Morishima, Nairobi, 7 October 2004; E Couzens.

²⁰⁹³ *Ibid.*

²⁰⁹⁴ *Ibid.*

delegates buying off African delegates'. He explains that his 'impression is now they're more pragmatic - if they can work out a deal in which they're the one end point, and can prove audits all the way, then they'll go along with that'; but that there is 'no direct governmental level interaction'. He says that in 1994 and 1997 there was no approach by Japan, either by government itself or by traders - 'except on the issue of bluefin tuna'.²⁰⁹⁵

14.3.3 Japan's attitude to nature outside of Japan

Professor Morishima suggested to me that Japan's attitude toward international law generally, and toward international environmental law, is changing. He argued that before 1980 Japan had become known as a state interested purely in economic growth; but that since 1980 Japanese policy has been forced to change. According to Morishima, 'until then focus was domestic, even though some international conventions were ratified - somewhat reluctantly'; Japan being 'a slow ratifier - until 1980ish - as, around then, policy changed'. 'Particularly in 1992 Rio', he explained, 'Japan decided we should *lead* international society in area of environment'; and, 'in 1995²⁰⁹⁶ decided to support the UNCED'. He then advised that the Brundtland Commission 'was fully supported by Japan - [which] paid *all* the monies!'. Around the same time, in respect of CITES, 'Japan started to change its policy'. Japan, he says, had 'made [a] reservation in respect of ivory, but then changed restriction and made positive steps in respect of ivory'; so, in his view, there was a drastic change from the mid-1980s in the 'Japanese attitude to international conventions'. In 1992, he said, Japan 'immediately ratified CBD and FCCC ... then hosted Kyoto 1997 to show Japan's positive attitude'. Finally, he advised looking at history; to see that 'whaling belonged to the before 1985 period' and that there was a 'strong Japanese attitude before then'. He said that there is apparently 'not much news on it' now. On ivory, he said that 'Japan [was] initially reluctant in respect of ivory (CITES) but then attitude changed'.²⁰⁹⁷

Far harsher as a judge of Japan's international actions, Maull writes that 'Japan's international environmental reputation is abysmal: it is widely seen as one of the worst offenders against the protection of nature and the global environment'. At the same time, however, he explains that 'this bad reputation appears somewhat surprising in light of Japan's domestic environmental policy record'; where 'Japan can point to a whole range of environmental laws and practices which are among the most advanced in the world'.²⁰⁹⁸

This assessment does make Japan appear both selfish and isolationist - protecting its own environment whilst, at best, evincing little concern for protection of the environment in other parts of the world. Maull argues that there are a number of peculiarities to Japan's environmental policy process. He suggests, for one thing, that 'public awareness of, and interest in, environmental issues, is low in Japan when compared with other developed countries, and international environmental issues in particular attract very little public attention'.²⁰⁹⁹ 'Japan's contribution', he suggests, 'to international environmental degradation and destruction

²⁰⁹⁵ *Personal Communication* Interview with David Western, Nairobi, 8 October 2004; E Couzens.

²⁰⁹⁶ Morishima referred to '1995' at this point - the present writer is unsure as to what he meant by this; or as to why he appears to precede the discussion of the Brundtland Commission with discussion of UNCED.

²⁰⁹⁷ *Personal communication*: Interview with Prof. Dr. Akio Morishima, Nairobi, 7 October 2004; E Couzens.

²⁰⁹⁸ H W Maull 'Japan's Global Environmental Policies' in A Hurrell & B Kingsbury (eds) *The International Politics of the Environment: Actors, Interests, and Institutions* (1992) 354 at 354.

²⁰⁹⁹ *Ibid* at 355-58.

basically comprises two different dimensions'; these being 'the impact of the Japanese economy' and the 'ecological shadow' of its global economic activities'.²¹⁰⁰

Maull does contend, however, that 'Japan's global environmental policies have [] been changing'. As evidence of this change, he argues that 'there has been a clear trend away from neglect, towards symbolic expressions of concern and even action to halt environmental degradation'; and that 'the Japanese government has followed its inclination to seek technological breakthroughs as a way to remove environmental constraints on economic development, an inclination well established in Japanese domestic environmental policies'.²¹⁰¹

Butterworth told me that he thinks that, in recent years, Japanese attitudes have changed; 'this', he said, 'is more just a personal perspective having worked quite closely with Japanese for 15 years or so ... the whole of Japanese industry is weaker than it was ... it may have been that the Japanese government was just there to do industry's bidding, as it were ... not any longer'.²¹⁰²

I asked Kleinschmidt whether he thought that Japan ever would withdraw from the IWC; pointing out that Japan *has* threatened to withdraw (after the Meeting of 2003, for example), but never has - even though others have, like the Netherlands, New Zealand, Norway, Canada, and (more recently) Iceland. Are they, I asked him, in it 'for the long haul'? 'It seems', he said, that:

they're in it for the long haul ... I got an impression that they won't withdraw ... partly because it satisfies the debate in Japan, or a constituency that is actually quite large ... and it gives currency and expression to that constituency ... which has got other political implications ... it shows Japan having a strong line on something ... and yet fights the good fight ... and when they get there they take their whales anyway ... they're not successfully selling the whale meat ... so they're taking it as far as they can ...²¹⁰³

I then asked Kleinschmidt whether he thought that, for the Japanese, whaling itself was really that important; or whether it was symbolic, and that it is a philosophy of use that the Japanese are fighting for. His answer was that:

there's that element of it, that meets a particular part of public opinion in Japan ... but it's not a growing opinion in Japan ... I think the utilitarian argument is the other side of where the Japanese are coming from in Shimonoseki ... they actually, they're very keen to say the day's coming when we will have sort of whale McDonalds crossing the ocean and then there will be a demand for this meat ... it's really hedging their bets for a situation when the demand for it will grow of necessity and for other reasons.²¹⁰⁴

On the subject of ivory, while the importance of the carving industry may have lessened in Japan, and import controls to be strict, there remains a market. Jackson, writing in 1990, suggests that '[p]resent-day Japan is the world's largest user of worked ivory' with 'more than half [being] carved into personal seals or *inkan*'.²¹⁰⁵ It is, he writes, 'estimated that at least 70

²¹⁰⁰ *Ibid* at 359-65. Maull explains that 'Japan's [official development assistance - ODA] has recently become the world's largest and can be expected to continue its rapid growth. But the distinction between government assistance and commercial activities of Japanese corporations has in the past been consistently blurred. ODA has thus often contributed to environmentally damaging projects of resource extraction and the relocation of polluting industries. ... and '[c]areful analysis [by Forrest] of Japanese ODA practices has concluded: 'It is becoming increasingly apparent that Japan's foreign economic cooperation programmes not only cause the same problems as those of other aid agencies, but that the particular emphases of Japan's system lie in projects that are socially and environmentally disruptive'. *Ibid* at 359-65.

²¹⁰¹ *Ibid* at 370-71.

²¹⁰² *Personal communication* Interview with Doug Butterworth, Cape Town, 17 December 2006; E Couzens.

²¹⁰³ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

²¹⁰⁴ *Ibid*.

²¹⁰⁵ P Jackson *Endangered Species: Elephants* (1990) at 88. *Inkan* [or *hanko*], per Jackson, 'represent a person's or a company's signature on documents, such as bank cheques and legal contract. Among several types of seal used for different

million ivory *inkan* are in existence, and that 2 million are produced every year'.²¹⁰⁶ In Harare in 1997 at the CITES COP, it was to Japan and for the purpose of the manufacture of *hanko* seals that the once-off sale by three Southern African countries was approved.

Japan is a state which has global reach, and which is of major significance in the war over the philosophy of use of natural resources which the world will eventually adopt. Japan has a very poor international environmental reputation. This reputation may not be altogether deserved; but certainly Japan is currently a destructive force to natural resources in many parts of the world.

14.4 The United States, Japan and whaling

14.4.1 A symbiotic relationship

As a historical curiosity, on the issue of possible hypocrisy, it has been suggested that in the 1980s it was a member of the US delegation to the IWC, one Dr William Evans, who suggested to Japan that scientific permit whaling be used to circumvent the moratorium on commercial whaling - and thereby to keep Japan as a member of the IWC.²¹⁰⁷ Nothing would seem to turn on this point, however, as this was not an official line of the US delegation; and further because Evans may not have envisaged the numbers that would be taken. It does, though, provide an interesting historical echo of the alleged involvement of General Douglas MacArthur²¹⁰⁸ promoting Japanese whaling in the aftermath of World War II to assist Japan in meeting its protein needs.²¹⁰⁹ What is perhaps implied and therefore supported, though, is the view that Japan and the United States have histories of involvement in whaling that have been inextricably involved; and which cannot be understood one without the other.

In the mid-19th Century, Japan was following a policy of keeping its borders rigidly closed to outsiders. This ended in 1853 when Commodore Matthew Perry²¹¹⁰ sailed to Japan and demanded recognition for the United States.²¹¹¹ The promotion and protection of whaling interests played a large part in the US' decision; and only some two years before, in 1851, when *Moby Dick* was published, Herman Melville wrote - in the context of a defence of the role and place of whaling - that '[i]f that double-bolted land, Japan, is ever to become hospitable, it is the whale-ship alone to whom the credit will be due; for already she is on the threshold'.²¹¹²

The combined history of the two countries, though, also provides a source of deep bitterness. An article in *The Economist* in December 2007 quotes the mayor of Taiji, 'a small whaling port, [as asking why] should Japanese ships have to go so far [as Antarctic waters], suffering

purposes, the most important is a person's *jitsuin*, which is registered with the government as an official mark on coming of age'. *Ibid* at 88.

²¹⁰⁶ *Ibid* at 88.

²¹⁰⁷ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 57.

²¹⁰⁸ 1880-1964, US General who accepted the Japanese surrender and commanded the Allied occupation of Japan from 1945-1951. *Collins English Dictionary* (3rd ed, 1991) at 933.

²¹⁰⁹ See, for instance, A Darby *Harpoon: Into the Heart of Whaling* (2007) at 52, 54.

²¹¹⁰ 1794-1858, US naval officer who signed a treaty with Japan in 1854 which opened Japan to Western trade. *Collins English Dictionary* (3rd ed, 1991) at 1161.

²¹¹¹ 'When Japan was a secret' *The Economist* 22 December 2007 88 at 90.

²¹¹² H Melville *Moby Dick* (1994 (first published 1851)) at 119.

international outrage? Because, he says, answering his own question, the Americans fished out all the Japanese whales in the century before last'.²¹¹³

On whaling, the US and Japan have mingled pasts - and probably mingled futures too. Understanding their relationship, past and present, is likely to provide clues to the future.

²¹¹³ 'When Japan was a secret' *The Economist* 22 December 2007 88 at 90.

15 Biodiversity

15.1 The importance of biodiversity

15.1.1 Linkage

From all sides of the debate, protagonists today depict conservation - in whatever sense they mean the term - as being the control, protection or management of interlinked species. Lapointe argues that '[p]roductive ecological dialogues are based on the premise that the environment is an interlocking system of habitats and species of which man is very much a part'; and that those who advocate this science 'are conservationists - individuals who accept that carefully managed species can be utilized in a sustainable manner'.²¹¹⁴ There is linkage everywhere. According to Watson '[t]he oceans and the forests ... are interdependent and the destruction of forests has a direct link to the diminishment of salmon and the pollution of coastal marine habitats. ... the protection of the forests is essential and falls within the overall activities of marine conservation'.²¹¹⁵

No serious commentator would, today, appear to question that such interlinking of species is what makes biodiversity so difficult to understand and so complex a thing to protect or manage. Nor, today, is it seriously questioned that protection and management are vital concerns.

On the need for concern, Woodard, for example, writes that '[m]arine scientists are frankly frightened by the scale and complexity of the emerging marine crisis'; and that the crisis 'is one that can only be averted if there is a dramatic change in our understanding of the ocean and its central role in maintaining life on earth'.²¹¹⁶ Schücking and Anderson tell us that '[a] mass extinction of species is not the sort of event that one would expect to pass unnoticed by most people. But just that is happening'.²¹¹⁷ 'A long standing split', they say, 'exists in the conservation movement' between so called 'preservationists' and those who feel that the 'wise use' of biodiversity 'is the best (and most realistic) road to its protection'. Much of the work of big conservation groups in the North, they argue, 'has been based on the propaganda of wise use, and has cited the manifold industrial potential of tropical biological diversity to justify the protection of these ecosystems'.²¹¹⁸

It might be questioned whether this is correct; and asked whether the North is not the home of the 'preservationist' argument?

²¹¹⁴ E Lapointe *Embracing the Earth's Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 4.

²¹¹⁵ P Watson *Ocean Warrior: My battle to end the illegal slaughter on the high seas* (1994) at 239.

²¹¹⁶ C Woodard *Ocean's End: Travels Through Endangered Seas* (2000) at 3. Woodard writes, for example, that '[t]he Black Sea is a microcosm of what is happening to the ocean systems at large. The stresses piled up: overfishing, oil spills, industrial discharges, nutrient pollution, wetlands destruction, the introduction of an alien species. The sea weakened, slowly at first, then collapsed with shocking suddenness'. *Ibid* at 3. This is also the view of the present writer - that as particular fisheries collapse with 'shocking suddenness', so might the whole global marine system. See 11.3.

²¹¹⁷ H Schücking & P Anderson 'Voices Unheard and Unheeded' in V Shiva (ed)/World Rainforest Movement *Biodiversity: Social and Ecological Perspectives* (1991) 13 at 14-17. The same writers record that '[a]ccording to an estimate by Peter Raven (1989), Director of the Missouri Botanical Gardens, we may already be losing 100 species per day. EO Wilson (1988) and Norman Myers (1986) estimate that 50 species are being driven to extinction per day. The causes for the loss of species are numerous but the most important is, without question, the loss and fragmentation of natural habitats'. *Ibid* at 14-17.

²¹¹⁸ Quoting Ehrenfeld, 1990. *Ibid* at 26-30.

‘The real challenge for a global programme to protect biodiversity’, continue Schücking and Anderson, however, ‘is to examine [] linkages’. A global programme, they say, ‘is necessary precisely because environmental problems in the Third World (and elsewhere) cannot be solved in a national context’; and because, ‘[g]iven the global interlinkages of the biodiversity crisis, no single approach to conservation can be effective’.²¹¹⁹

Ultimately, that is the feeling of the present writer too; that neither ‘conservation’ nor ‘preservation’ *in and of themselves* will be able to solve the global biodiversity crisis - but that where both are used, supporting and sustaining each other, there might be a possibility (albeit slight) of solving the crisis.

Leite, Ferreira and Ayala write that ‘the environmental crisis has reached a new dimension’ and ‘has become a global and complex crisis, an undivided and interdependent part of a larger crisis’. They suggest that Morin (2003) calls this larger crisis a ‘*poly-crisis*’. Within this *poly-crisis*, they say, it is ‘not possible to establish a hierarchy of concerns because there is not just one critical problem, but many interlinked critical problems causing the worldwide crisis’. In this manner, they conclude, ‘it is necessary to pursue distinct efforts, which would reach the political, economic, social and judicial sectors, in order to pursue an effective protection of the environment’.²¹²⁰

There is certainly an argument to be made that at least certain areas of natural complexity ought to be preserved intact as far as possible - in other words, not managed, not used, and left virtually pristine. Clover writes that Auckland University’s Marine Laboratory’s Dr Bill Ballantyne, ‘godfather to the world’s marine reserves’, contends that ‘[w]hether reserves would help fisheries is not the point’. The point, he apparently says, ‘is that there should be areas of the sea where we see what nature is like in the absence of human transformation’.²¹²¹ The fact is, according to Ballantyne, ‘that choosing reserves because you want to protect this or that is a mistake’; and the ‘fundamental thing is to protect some of the marine environment’ through the very simple idea of ‘leaving parts of the sea alone’.²¹²²

15.1.2 The importance of preserving biodiversity

Chadwick points out that ‘[t]he public is used to thinking of extinction in absolute terms’ where ‘either an animal is still here and struggling to carry on, and we are absorbed by the drama of trying to save the last few survivors against eternal oblivion, or it is gone’. Unfortunately, he explains, in reality ‘long before the brink is reached, and usually before the species’ plight even starts to attract widespread concern, a substantial portion of the genes it carries will already have gone extinct’.²¹²³ Chadwick continues; arguing that ‘[t]he metaphor of the canary in the coal mine may be terribly overworked, but try thinking of elephants in that context’. ‘If a trumpeting, five-ton canary cannot hold our attention’, he argues, ‘what can?’. He explains that

²¹¹⁹ *Ibid* at 34-37.

²¹²⁰ JRM Leite; HS Ferreira & PdA Ayala ‘Protection of Natural Spaces in Brazilian Environmental Law’ in N J Chalifour, P Kameri-Mbote, L Heng Lye & J R Nolon (eds) *Land Use Law for Sustainable Development* (2007) 471 at 471.

²¹²¹ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 216-229.

²¹²² *Ibid* at 216-229.

²¹²³ D H Chadwick *The Fate of the Elephant* (1992) at 304.

‘[e]lephants also tell us that the diversity of human cultures is tied to natural diversity’.²¹²⁴ Again, one can see the importance of the elephant as a symbol.

On the problem of preserving the biodiversity of the elephant’s habitat, Chadwick writes that ‘[t]he problem is not just that elephant habitat is shrinking in terms of absolute size’; but that it is ‘being fragmented at the same time, shattered into discontinuous shards’. He goes on to say that this has serious consequences also for other species which live within elephant ranges; with a useful explanation for this being found in the ecological theory described as ‘island biogeography’. The longer an island has been isolated, he advises, ‘the less common features its flora and fauna will have with communities on the mainland’ and such areas struggle to hold enough members of, especially larger, species needed to maintain a stable gene pool.²¹²⁵ Parker essentially agrees with this observation; writing that island biogeographic theory is ‘compelling’ as national parks in Africa ‘are all becoming islands to which the theory will apply’. No elephant population yet studied, says Parker, has been found to be stable or ‘in balance’ with its environment.²¹²⁶

This last point might well be a crucial counter to the arguments by SANParks and others in favour of the culling of elephants within South Africa. If it is not possible to achieve the balance sought through culling, the possibility is that culling will risk doing more harm than good. Of course, the counter-argument might be made that if it is never possible for elephants to be ‘in harmony’ with their ecosystems then control, and active management with the object of achieving at least stasis, will be the best possible objective. On this, Thomson tells us that the degree of ‘controlled protection’ needed by each species, or the degree of ‘controlled use’ which can be made of each species, may vary ‘with considerable rapidity’; and, consequently, ‘the legislation giving force to management controls has to be elastic enough to accommodate change’.²¹²⁷ ‘The decision *not* to interfere’, argues Thomson, ‘must still be recognized as being just as subjective and man-made as any other management decision’.²¹²⁸

‘Elephants’, continues Parker, ‘need continents, not islands - even if they are called national parks’. He then explains that park managers ‘the length and breadth of Africa’ have learned that elephants ‘introduce chaos because no park is big enough to hold more than a population cell or two - at most several’.²¹²⁹ He then argues that a single elephant population within a national park is as ‘incomplete a phenomenon’ as is a single elephant within a zoo.²¹³⁰

An example of changing understanding of elephant ecology concerns changing conceptions of different types of elephant - some of which have, at different times, been valued differently. The Douglas-Hamiltons, for instance, write that in 1987 Joyce Poole ‘explained the significance of the big males whose very age was a proof of their success, identifying them as carrying the best genetic stock for survival’; Poole feeling that ‘above all they should be preserved, yet they had been the first to go elsewhere’.²¹³¹

²¹²⁴ *Ibid* at 470-1.

²¹²⁵ *Ibid* at 468-9.

²¹²⁶ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 394-6.

²¹²⁷ R Thomson *On Wildlife “Conservation”* (1986) at 43.

²¹²⁸ *Ibid* at 73.

²¹²⁹ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 394-6.

²¹³⁰ *Ibid* 394-6.

²¹³¹ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 303.

The integration of ecological concerns with economic and social concerns preoccupies some modern commentators. Odling-Smee writes that '[a] new hard-headed breed of conservationists say we should not concentrate exclusively on saving the rare and endangered or on protecting species diversity'; but that, instead, 'decisions need to be made within a rigorous economic framework'. Some, she says, 'argue that the key to effective conservation is quantifying and promoting' the economic 'services' that ecosystems provide for people.²¹³² However, she records, 'many conservation biologists are concerned that giving natural habitat a monetary value risks losing sight of the ethical and spiritual dimensions of conservation'. The other side of the argument, however, is that - in her words - 'against the backdrop of environmental devastation now gripping the planet, and the scant resources devoted to conservation, there is a growing realization that economic arguments must become a key weapon in the movement's arsenal'.²¹³³

Glavovic writes that '[t]he modern approach to conservation of natural resources is to try to maintain biotic diversity by protecting entire ecosystems'; with this being in recognition of the fact that the protection of species cannot be achieved, or not effectively, without habitat protection. Together, he says, species and habitats constitute natural ecosystems; with the debate framed in utilitarian terms, they are two aspects of the same basic resource.²¹³⁴

Thomson contends that '[o]ne of the fundamental laws of nature is that no two species occupying the *same* niche - that is, performing *identical* work - can co-exist indefinitely, because one will eventually oust the other'.²¹³⁵ He then explains that when attempts are made to judge how valid wildlife management decisions are, it is 'important to understand that nature is *not* in a constant harmonious balance - even when man has *not* interfered'. In his view it is 'critically important to emphasize' that the balance of nature is not a 'frozen' balance; but is instead a 'constantly changing phenomenon that moves from one state of *dynamic* equilibrium to another'.²¹³⁶

Thomson then argues that certain species - the examples he gives being quelea finches, bushpigs, baboons, monkeys, black-backed jackals and caracal - require no protection; because 'despite man's earnest endeavours to wipe them out each year, they return in renewed numbers the next'. He argues that '[m]an can therefore institute the harshest of efforts to eliminate' these species without fear of causing their extinction'. His reasoning is that 'pest (or potential pest), abundant and common species *sometimes* have to be actively reduced in number (negative conservation management)', but that 'more often than not these categories of animals can be ignored'; and that the implication of this is that 'their numbers neither have to be reduced nor protected' - their needs being 'neutral' in terms of conservation management. These species will, he concludes, 'survive and thrive no matter what man does to them'.²¹³⁷

The present writer simply cannot agree with this. Although habitat loss, and so forth, are important factors; it is what man has done to animal species he has classified as 'vermin' that

²¹³² L. Odling-Smee 'Dollars and sense' (September 2005) 437 *Nature* 614 at 614.

²¹³³ *Ibid* at 616.

²¹³⁴ P D Glavovic *Wilderness and the Law* (1995) at 22.

²¹³⁵ R Thomson *On Wildlife "Conservation"* (1986) at 9.

²¹³⁶ *Ibid* at 13-15. As Thomson explains, '[e]cology is the study of organisms in relation to their environment. Man cannot destroy the ecology of an area because an area does not have an ecology. (What man can do, and often does, is change the state of natural dynamic balance in a given area.)'. *Ibid* at 19.

²¹³⁷ *Ibid* at 31-33.

has driven species like wild dogs to endangered status, and affected lions so badly - not to mention the drive to complete extinction of an 'indestructible' creature like the passenger pigeon in the US.

Thomson argues further that '[p]redators under totally natural conditions only have a dampening effect on animal population growth'; and that '[t]hey do not keep herbivorous populations in balance with their habitats, but the relative abundance of prey species can, and often does, have a direct effect on the population numbers of predators'. Predation, he says, is therefore 'not normally a major factor in regulating the population numbers of herbivorous species'; but that '[p]opulation numbers in any species are fundamentally and more finitely controlled by the species' behaviour, such as home-range occupancy, territoriality, and rank structure, and the relative abundance of habitat resources such as food, water, shelter, and cover'.²¹³⁸

15.1.3 Conclusion

Little more than 50-100 years ago, States Parties to international conventions were classifying certain species as 'noxious' and recommending their extermination. It would be extremely dangerous for us now, only a little more than 25 years after adopting the first Convention to adopt an 'ecosystem' approach (CCAMLR), to claim that we now understand how nature works. Almost certainly, in 200 years' time, the scientists of the future will be mocking our lack of insight. Despite this, in the present writer's view, we continue to fail to recognise the importance, complexity and fragility of biodiversity.

15.2 The Convention on Biological Diversity

15.2.1 The Convention

As it becomes apparent that the ICRW and CITES may not be able to offer any greater protection to endangered species, or enable harmony between their Parties, than they do at present, and as their weaknesses become more exposed, so newer treaties must be looked to. The 1992 Convention on Biological Diversity ('the CBD') is perhaps the best example of new approaches to the concluding of environmental treaties.

The Preamble to the Biodiversity Convention affirms that states have 'sovereign rights over their own biological resources'.²¹³⁹ However, it also affirms that the conservation of biological diversity is 'a common concern of humankind' and that states are 'responsible for conserving their biological diversity and for using their biological resources in a sustainable manner'.²¹⁴⁰

²¹³⁸ *Ibid* at 68.

²¹³⁹ Article 3: Principle, reads: 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction', Convention on Biological Diversity, <http://www.cbd.int/convention/articles.shtml?a=cbd-03>.

²¹⁴⁰ Preamble, Convention on Biological Diversity, <http://www.cbd.int/convention/articles.shtml?a=cbd-00>. While these terms appear in the Preamble and not in the Convention text, it would be very difficult for any State to argue that they are not necessarily implied by a number of the Convention's Articles. For instance, Article 8: In-situ Conservation states that '[e]ach Contracting Party shall, as far as possible and as appropriate: ... (c) Regulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use', see <http://www.cbd.int/convention/articles.shtml?a=cbd-08>.

Christopher Stone has an interesting view on the CBD; stating that ‘there is a reason why a higher than average level of obscurity and equivocation - not merely in detail but in sense of institutional mission - was probably unavoidable’ in the text. The explanation, he says, ‘is to be found in the Rich-Poor tensions which have left their mark on all the recent environmental accords, but perhaps affected the CBD in particular’.²¹⁴¹ He argues that ‘[t]hese divergent motives, the persistent tensions, and efforts alternately to ease and ignore them, have all left their imprint on the text and on the ensuing progress of the parties’.²¹⁴²

The Biodiversity Convention goes beyond CITES by establishing objectives for the comprehensive preservation of biological diversity, reflecting objectives of the 1980 World Conservation Strategy. The Biodiversity Convention has three objectives; these being ‘the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources’.²¹⁴³

15.2.2 Perceptions of the CBD; and the role it might come to play

The Biodiversity Convention goes further than CITES also by seeking to protect ecosystems and habitats, making provision for identification, monitoring and protection of areas important to species that might be endemic, threatened, migratory or have scientific, cultural, economic, social or evolutionary importance. Ideally, then, if CITES and the CBD could work successfully and in tandem, there would be international legal protection offered to endangered (and other) species both within nations and in transition between States.

Pickover describes the CBD as being ‘a pro-use document’; arguing that it does not list ‘international trade’ as one of the six major causes of biodiversity loss. Proponents of use within southern African countries, she says, take advantage of this in that they argue that developing countries ‘want to see fewer, not more, exemptions for environmental purposes and that stimulating trade helps conservation’.²¹⁴⁴ The categorisation of the CBD as ‘pro-use’ might not be altogether fair. Certainly, by providing for use, the convention is inherently pro-use; but it does provide sufficient *caveats* that non-use might even be seen as a valid option, and therefore that the convention is ‘pro-balance’.

A fairly commonly held view of the ICRW is that it ‘has become too far removed from the realities of current political needs to meet adequately the needs of whale conservation’. The reason suggested for this is that the Convention ‘has survived in its current anachronistic form’ simply because its members ‘are divided into two deadlocked camps: pro-whaling and anti-whaling countries’; and that ‘[a]ny change in the balance between them may cause the machinery to collapse and so it remains static and antiquated’.²¹⁴⁵

The question that arises, then, is whether the CBD could be used somehow to replace, to supplement, or to repair the ICRW. By ‘repair’ is meant the bringing together of the polarised parties in common understanding and agreement as to how the Convention should operate.

²¹⁴¹ C D Stone ‘The Convention on Biodiversity’ in *Should Trees Have Standing? And other essays on law, morals and the environment* (1996) 119 at 120-121.

²¹⁴² *Ibid* at 120-121.

²¹⁴³ Article 1 of the 1992 Convention on Biological Diversity, Rio and Nairobi.

²¹⁴⁴ M Pickover *Animal Rights in South Africa* (2005) at 51.

²¹⁴⁵ G Rose & S Crane ‘The Evolution of International Whaling Law’ in J Kirkby; P O’Keefe & L Timberlake *The Earthscan Reader in Sustainable Development* (1995) at 34.

Birnie writes that ‘the entry into force on December 29, 1993 of the Biodiversity Convention has introduced broader environmental and ecological perspectives into marine species conservation in general at the global level.’ She tells us that ‘[t]he CBD currently has over 180 ratifications, and of the ICRW’s 47 parties all but South Korea and the US are also CBD parties’.²¹⁴⁶ Although a comparatively recent article, having been published in 2003, Birnie’s figure for ICRW parties is substantially out of date - there are currently 83 parties. Birnie continues; writing that apart from Article 8, which requires, ‘as far as possible and as appropriate’, the establishment of a *system* of protected areas or areas where special measures need to be taken to conserve biological diversity, ... the CBD’s only other specific reference to the marine environment is found in Article 22 concerning the relationship of the Convention to other international conventions’; which provision ‘saves any effect on the rights and duties of the CBD parties deriving from other international agreements’ unless the exercise of such agreements would cause ‘serious damage or threat to biological diversity’.²¹⁴⁷ It is noteworthy, says Birnie, ‘that the CBD does not specifically refer here to the UN Convention on the Law of the Sea’; but that this is ‘not surprising since ... the Convention does not explicitly require conservation of marine biodiversity and not all states (including some CBD parties) are parties to it’.²¹⁴⁸

According to Birnie, further, ‘the precise problems of conservation of marine ecosystems and biodiversity have been largely overlooked by the CBD despite their inclusion within its jurisdictional scope’.²¹⁴⁹ On ‘jurisdictional scope’ it might even be asked whether the adoption of the CBD means that whaling has not arguably been brought into the fold of global governance. Birnie asks: ‘[c]an it be said at present that a global regime (in a broad sense) exists for conservation of whales and other cetaceans, much less for conserving cetaceans as components of biodiversity or even any form of organized system?’. She tells us that Andresen, in 1999, suggested that the IWC ‘is linked only to a limited number of other bodies and instruments, such as the Delegation of the 1972 [UNCHE], the 1982 [UNCLOS], the 1973 [CITES], the 1992 [NAMMCO] and the various existing international trade regimes’. Birnie’s assessment of this, however, is that it is an extremely narrow approach which is ‘open to debate following the adoption of the UNCED instruments and the CBD’.²¹⁵⁰

Despite her concluding sentiment, the fact that states have continued to treat the IWC as the prime managing authority for whaling, and have made no or little effort to involve the CBD, implies strongly that the narrow approach is not currently debatable. Whether it ought to be debated is another question; addressed by Birnie when she says that ‘[a] highly contentious issue is whether there remains a compelling rationale for continuing to vest exclusive authority for whaling issues, including population assessments and assessment of threats, in a single international organization’. She explains that the IWC’s membership is limited ‘and its research agenda is probably too narrow to encompass all of the critical research necessary to ensure that cetaceans remain an important component of marine ecosystems’. She then says that ‘[e]ven though the ICRW permits *any* state to become a party, and whales are found in most states’

²¹⁴⁶ P Birnie ‘The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 103.

²¹⁴⁷ *Ibid* at 106-07.

²¹⁴⁸ *Ibid* at 106-07.

²¹⁴⁹ *Ibid* at 110. Birnie references Freestone on this point.

²¹⁵⁰ *Ibid* at 111-12.

maritime zones, its membership has never risen above the current tally of 47, while the CBD binds over 180 states'.²¹⁵¹

Although Birnie's figure for membership is badly incorrect as at 2008, the significance of her point - that the CBD is considerably more representative of states generally - remains unchanged, and remains relevant. The fact that her figure is so wrong, although her article is a recent one, points also to a sudden recent surge in membership (which will be discussed later).²¹⁵²

According to Birnie, commenting as did Stone above,²¹⁵³ '[i]t must be acknowledged that the CBD is replete with vague terms and amorphous commitments by the parties'; but she then goes on to argue that the 'exceptionally wide participation' in the CBD, 'which the generality of many of its terms has facilitated,' is 'salutary' despite there being many ambiguous provisions and a lack of 'specificity' on member responsibilities.²¹⁵⁴

Of course, it might be argued that this is simply the usual trade-off in international law - without which it might not have been possible to have had any convention agreed to at all. 'Unfortunately', writes Birnie, 'because of the many compromises required to secure consensus on an agreed text, while the [CBD] does provide a framework within which its parties can take the action it requires for conservation of marine biodiversity, it does not prescribe any explicit measures for doing so'.²¹⁵⁵

Sand does argue, firmly, that the CBD is applicable to whaling. In his view, the CBD contains provisions which are binding on member states 'to take measures for the conservation of biological resources, including under Article 3 to avoid environmental harm, and under Article 5 to cooperate for the conservation of biological diversity also in areas beyond the limits of national jurisdiction, as well as under Article 14 to assess the environmental impacts of projects posing significant risks for biodiversity'.²¹⁵⁶ He then argues that '[t]here is no doubt that massive killings of protected marine mammals in the Antarctic and the Northwest Pacific would fall under these provisions';²¹⁵⁷ and that a state would not be able to avoid this by 'invoking the primacy of IWC provisions, as CBD Article 22(1) does not apply' where there is 'serious damage or threat to biological diversity'.²¹⁵⁸ He concludes, however, that the only recourse which CBD members have, where another member is in non-compliance, is by way of conciliation proceedings (per Article 27).²¹⁵⁹

²¹⁵¹ *Ibid* at 114-15.

²¹⁵² See 16.

²¹⁵³ See (n 2141) and (n 2142).

²¹⁵⁴ P Birnie 'The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 118-19.

²¹⁵⁵ *Ibid* at 120-21.

²¹⁵⁶ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 60.

²¹⁵⁷ *Ibid*.

²¹⁵⁸ *Ibid* at 60, fn 40.

²¹⁵⁹ *Ibid* at 60.

15.2.3 Problems

Newer treaties are starting to include mechanisms designed to facilitate improved compliance. 'It has become apparent in recent years,' writes Bowman, 'that the prospects of success of any treaty which has the protection of the environment as its principal objective will depend to a considerable extent upon the effectiveness of the institutional mechanisms which it incorporates'.²¹⁶⁰ 'A crucial lesson', Bowman continues, 'to be derived from the whole experience of the evolution of environmental law since the 1960s, brought home with particular force in the forum of the Rio Earth Summit [the United Nations Conference on Environment and Development - 1992] is that paper obligations in the area of nature conservation mean nothing unless backed by hard cash'.²¹⁶¹

Arguably, it can be seen from the changing provisions of newer treaties that this lesson may have been learned.²¹⁶² Governments in the developing world have become aware that their possession of natural resources gives them a strong hand, when demanding that treaties in regard to natural resources contain financial aid provisions. As such, they are unlikely today to conclude treaties that do not provide for such aid. And developed countries and non-governmental organisations are turning away from deterrence as an inducement.²¹⁶³

Stone, however, provides a sober view of the CBD, writing that '[a]ny critique of the CBD has to make allowances for the circumstances in which the Parties are operating'; and that it 'is a hard time for the international environmental movement in general'. It is easier, he says, 'to rally support for particular biological assets - tigers or wetlands - than for a relatively abstract *biodiversity*'. Many people, he says, 'wonder, why not simply protect tigers under CITES, wetlands under the Ramsar Convention on Wetlands, migratory birds under migratory bird conventions, and so on'.²¹⁶⁴

According to Stone one can consider the 1982 World Charter for Nature,²¹⁶⁵ which proclaims that 'every form of life is unique, warranting respect, regardless of its worth to mankind'; but that it is 'far from clear' how one 'respects' an ecosystem. Actions, he says, 'that perturb one equilibrium promote its successor'; and gives as an example of this that if there are fewer whales, there ought to be more krill. What if, he then asks, 'one is forced to choose among species, because we cannot respect *all* equally? Do we conserve the one that is oldest, or most rare, or highest on the food chain? What account is to be made for sites and species that occupy important places in the life of a culture?'. He concludes by suggesting that this area is 'replete with dauntingly complex questions' - questions which are difficult not merely to answer, 'but even to pose coherently'.²¹⁶⁶

²¹⁶⁰ M J Bowman 'The Ramsar Convention Comes of Age' (1995) 42 *Neths ILR* 1 at 33.

²¹⁶¹ *Ibid.*

²¹⁶² One thinks, for instance, of the Global Environment Fund (GEF) of the CBD of 1992.

²¹⁶³ See (n 26).

²¹⁶⁴ C D Stone 'The Convention on Biodiversity' in *Should Trees Have Standing? And other essays on law, morals and the environment* (1996) 119 at 127.

²¹⁶⁵ See, generally, 'World Charter for Nature' United Nations General Assembly Res. A/RES/37/7, 28 October 1982 <http://www.un.org/documents/ga/res/37/a37r007.htm>. See (n 333) and (n 2167).

²¹⁶⁶ C D Stone 'The Convention on Biodiversity' in *Should Trees Have Standing? And other essays on law, morals and the environment* (1996) 119 at 126. An iconoclastic view comes from Parker, who writes that '[a]rguing that biodiversity *per se* should be preserved so we do not lose chemicals and cures yet to be discovered, must surely be countered by the evidence that it may as equally be a source of further horrible diseases. What other eboloid sicknesses lurk in rain forest shadows?'. I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 381.

The World Charter for Nature does rather seem to have stepped into the wings; however, there is one interesting (and important) group which does rely on it to justify its activities in opposition to whaling - the Sea Shepherd Conservation Society. When asked by the present writer, in mid-2007, what he felt gives Sea Shepherd the right to intervene against Japanese scientific permit whaling, Paul Watson said that he thinks that 'the United Nations World Charter for Nature states very specifically that non-government organisations can intervene to uphold international conservation law'; and that that is 'what we're doing'.²¹⁶⁷

Harrop has suggested that 'as animal welfare legislation is seen to falter in the face of a new and comprehensive multilateral trade regime it may [become] mandatory to look to international instruments and standards in order to redress the imbalance'.²¹⁶⁸ However, as Stone suggests of the CBD, '[t]he Convention is launched with a Preamble that sounds both chords - preservationism and development - without acknowledging the inherent disharmonies'. He explains that biological diversity 'is honored both for its intrinsic and its instrumental worth', being 'affirmed to be a common *concern* of mankind'; but that the Convention 'stops short of endorsing a common heritage viewpoint'. He concludes that '[t]o leave no doubts on this score, the sovereign rights of states over their biological resources is explicitly affirmed'.²¹⁶⁹ As Stone finally points out, '[i]nternational law almost uniformly takes nation states as the units of significance, disregarding internal impacts'.²¹⁷⁰

Member states' obligations under the treaty are not onerous. They are entrusted with identifying and monitoring significant areas on their own, with 'regard' to the safety guidelines of Annex 1. Each member state is to establish a system of protected areas 'as far as possible and appropriate' to conserve biodiversity.²¹⁷¹

Creating such a system will never be easy. The difficulty is compounded by the problem that, even once created, such a system might not *by itself* be enough. Parker, for instance, contends that 'nothing - animate or inanimate - can enter an ecosystem without influence'; and that the 'passage of a million tourists through Kenya's national parks may seem harmless, but it is a profound influence whose complexities are beyond us to describe'.²¹⁷² Vogler argues that 'it may be that a concentration on states misses the point'; and that '[g]lobal regimes, like any other regimes, involve human social interaction'.²¹⁷³

²¹⁶⁷ *Personal communication* Interview with Paul Watson, Anchorage, 28 May 2007; E Couzens. The actual provision relied on is presumably s 16, which reads: 'States and, to the extent they are able, other public authorities, international organisations, individuals, groups and corporations shall: ... (c) implement the applicable international legal provisions for the conservation of nature and the protection of the environment; ...'. UN General Assembly Resolution 37/7: World Charter for Nature, 28 October 1982, UNEP *Selected Texts of Legal Instruments in International Environmental Law* (2005) 83 at 85. See (n 333) and (n 2165).

²¹⁶⁸ S R Harrop 'The Dynamics of Wild Animal Welfare Law' in (1997) 9:2 *Journal of Environmental Law* 287 at 301.

²¹⁶⁹ C D Stone 'The Convention on Biodiversity' in *Should Trees Have Standing? And other essays on law, morals and the environment* (1996) 119 at 121.

²¹⁷⁰ *Ibid* at 126.

²¹⁷¹ Article 8: In-situ Conservation states that '[e]ach Contracting Party shall, as far as possible and as appropriate: ...(a) Establish a system of protected areas or areas where special measures need to be taken to conserve biological diversity', see <http://www.cbd.int/convention/articles.shtml?a=cbd-08>.

²¹⁷² I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 397-8.

²¹⁷³ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 219-20.

On the other hand, there is increased recognition of the need for synergies. At CITES COP 13 in 2004, there was a significant focus on synergy between CITES and the CBD.²¹⁷⁴ At COP 14 in 2007, the Chair, Gerda Verburg of the Netherlands, Minister of Agriculture, Nature and Food Quality, suggested that CITES has a ‘contribution to make’ to the ‘global target of halting biodiversity loss by 2010’.²¹⁷⁵ The Chair of the Scientific Committee, Ambassador Cristian Maquieira from Chile, then argued that there is a need to situate CITES ‘within the wider framework of international environmental developments, and to contribute to ongoing UN discussions on international environmental governance’.²¹⁷⁶

Greg Donovan told the present writer, however, that there is at present little cooperation between the IWC and the CBD, although ‘there has been talk about it’. He then said that he ‘suspected’ that such cooperation ‘would be more at the scientific level’.²¹⁷⁷ Put to him that the CBD might be the one international instrument which could be used to bring the IWC’s ‘warring’ parties together; Donovan responded that he did not think that there was another treaty that could do this, given that the parties are so polarised.²¹⁷⁸

15.2.4 *The CBD in the future*

Until such time as the Biodiversity Convention and other new treaties have proved to be effective in reconciling the widely divergent approaches to conservation held by important international actors, if this optimistic prediction is ever confirmed, there will be tension between the protagonists of preservation and those who advocate sustainable use. In international law, this tension will be most visible in the inadequacies of those treaties through which countries currently seek to express their environmental views. In a sense, perhaps, what is needed is an ‘ecosystem approach’ to international environmental law.

According to Stone ‘[s]ome parties see the framework as exploitable as a public forum for the airing of grievances on a collection of issues of deep concern and inconsistent understanding, such as the reverberations of international trade, the ecological insensitivity of the World Bank and WTO, and the widely-rumored wickedness of patent law’. Another, ‘overlapping’ group, he argues, ‘has hopes of turning the CBD into a sort of umbrella framework for all biodiversity-touching treaties and agencies’; and that this latter faction sees the existing institutional landscape as being too fragmented and ‘piecemeal’, and therefore requiring ‘coordination or consolidation under the CBD’.²¹⁷⁹

Stone points out that the funding mechanisms in the CBD may prove cumbersome. ‘If this happens’, he argues, then, ‘starved of funds and competent enthusiasts, the CBD will limp along in marginal relevance, the delegates having only themselves as audience’; and this ‘would be a disappointment’.²¹⁸⁰ In contrast, he explains, ‘with new domestic environmental

²¹⁷⁴ International Institute for Sustainable Development (IISD) ‘Fourteenth COP to CITES’ *Earth Negotiations Bulletin* Vol. 21 No. 51, 4 June 2007.

²¹⁷⁵ *Ibid.*

²¹⁷⁶ *Ibid.*

²¹⁷⁷ *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

²¹⁷⁸ *Ibid.*

²¹⁷⁹ C D Stone ‘The Convention on Biodiversity’ in *Should Trees Have Standing? And other essays on law, morals and the environment* (1996) 119 at 129.

²¹⁸⁰ *Ibid* at 130.

legislation, ... the governance of each new multilateral environmental regime has to be built from the bottom up ... [l]ong, frustrating, often windy start-up periods are the rule'.²¹⁸¹

This is not just a danger. After the years that have passed so far, it is quite possibly the reality.

By way of practical suggestion, Stone argues that 'the commitment at the last COP to examine Marine and Coastal biodiversity could evolve into a valuable undertaking, if, instead of duplicating the work of the UNEP Regional Seas Program, the [UNCLOS], and other agreements already in place, the Parties can provide a spark and guidance to get structures already in place to link and operate effectively; that would be useful'. But, he asks, 'will those who gravitate to control of the COP be able to define for themselves a limited role?'; and, '[c]an the CBD framework be steered to those areas where it will do more good than the same resources channeled through alternate, existing fora?'. These questions, says Stone, 'are not rhetorical'; but, 'in a world willing to offer dwindling resources for medicating the planet,' they 'are the major questions that remain to be answered'.²¹⁸²

15.2.5 South Africa's view

The present writer asked Minister van Schalkwyk whether he thought that it was better to see treaties on their own as single issue treaties, treaties dealing with single issues; or whether it would be better to have treaties linked and under an umbrella like, for instance, the Convention on Biological Diversity. He answered that this was 'a very difficult question that we have debated many times in the past and there are pros and cons to both'. 'The problem', he explained, 'by grouping all of them together under an umbrella treaty is very often single issues then don't receive the attention that many people feel they deserve - but that's an ongoing debate for us'. 'I must also say, though', he continued, 'that the other side of the coin is that international meetings, international negotiations, are taking up a lot of our time at present ... so we're starting as a developing country to cut down on what we can and what we can't do'. By way of example, he said that 'simply looking at our African counterparts, we had the CSD two weeks ago in New York, we have this meeting here, ... very often we are the only African country at these international meetings, or one of three or four or five African countries ...and so it is causing us some real practical headaches in that regard'. 'Our view', he concluded, 'is that the time is simply not yet ready to really cluster all of them together'.²¹⁸³

15.2.6 Conclusion

Arguably the most important step that we have taken - in international law - toward recognising the limits of our traditional 'categorisation of species' approach to our use and protection of wildlife is the adoption of the CBD. This is the first global convention to urge the protection not just of particular species but the protection of habitats and ecosystems in order to provide particular species with protection. The CBD is problematic - particularly because the obligations which it places on its Parties are so weak - but it is a giant step forward. Ultimately, it might well be under the banner of the CBD that the resolution to the 'preservation'/'conservation' conflict will be found.

²¹⁸¹ *Ibid* at 130.

²¹⁸² *Ibid* at 130-131.

²¹⁸³ *Personal communication* Interview with Minister Marthinus van Schalkwyk, Anchorage, 30 May 2007; E Couzens.

15.3 Ocean sanctuaries

15.3.1 *The creation of the Southern Ocean Sanctuary*

At IWC 46 in 1994, a proposal was made by France to declare the entire Southern Ocean as a whale sanctuary - the prohibition on taking whales within this area to be reviewed at successive ten-year intervals. After much debate a vote was taken, and the proposal adopted by 23 votes in favour, with 1 against and 6 abstentions.²¹⁸⁴ In its Opening Statement, France explained its proposal as being ‘to prevent any possible failures of a management method and to guarantee that the whale populations are granted a total protection status in an ecosystem very little disturbed to date and for which very serious conservation commitments have been given’. ‘[F]uture generations’, suggested France, ‘will not judge us on the quality of the scientific programme we have carried out on whales as much as on the results of the protection measures taken’.²¹⁸⁵ Japan argued against the proposal on the ground that France was putting the proposal forward without having demonstrated that ‘such an extreme measure was the only means of conserving whales in that vast area’; and that the proposal was ‘being put forth for political reasons’ and ‘was nothing but an attempt to sabotage sound sustainable utilization of these marine resources’.²¹⁸⁶

15.3.2 *South Africa’s vote*

At IWC 46 in 1994 South Africa voted in favour of the Southern Ocean Sanctuary.²¹⁸⁷ At IWC 59 in 2007, South Africa gave its support to a sanctuary proposal put forward by the Latin American bloc - as discussed in my discussion of IWC 59, however, the proposal was a non-starter and probably put forward because the Latin American bloc wished to be seen to be making a tangible effort at the Meeting.²¹⁸⁸

15.3.3 *Conclusion*

One of the most significant ways in which the CBD might come to play a vital role lies in the increased use of marine sanctuaries. Provided for in the original ICRW text,²¹⁸⁹ sanctuaries are not a new idea - but they have been underutilised. Probably this is because they have come to be seen by warring Parties as a political tool. Properly used, sanctuaries have the potential to provide the best scientific data for us to understand - and to protect - biodiversity.

²¹⁸⁴ IWC ‘Chairman’s Report of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) at 27-29.

²¹⁸⁵ Opening Statement by France to the IWC ‘Opening Statements of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) IWC/46/OS/France at 1.

²¹⁸⁶ Opening Statement by Japan to the IWC ‘Opening Statements of the Forty-Sixth Annual Meeting’ (23-27 May 1994, Mexico) IWC/46/OS/Japan at 2. The 23 parties which voted in favour of the proposal were Antigua and Barbuda, Argentina, Australia, Austria, Brazil, Chile, Denmark, Finland, France, Germany, India, Ireland, Mexico, Monaco, The Netherlands, New Zealand, the Russian Federation, South Africa, Spain, Sweden, Switzerland, the UK and the US. Japan was the only country to vote against the proposal; but China, Dominica, Grenada, Rep of Korea, St Vincent and the Grenadines and the Solomon Islands abstained. Norway appears not to have participated in the vote. IWC/46/53 ‘Proposal for a widely acceptable Southern Ocean Sanctuary’ *IWC Voting Records* 1994. Japan retains a reservation in respect of the sanctuary and is therefore not bound to observe it.

²¹⁸⁷ ‘Proposal for a widely acceptable Southern Ocean Sanctuary’ *IWC Voting Records* 1994 IWC46/53.

²¹⁸⁸ See 3.3.27, 3.3.30 and (n 777).

²¹⁸⁹ Article V.1 (c) of the ICRW.

16 ICRW/IWC membership

16.1 Conflict

16.1.1 Allegations of 'vote buying'

Japan has often been accused of attempting to garner votes from both IWC voting parties and CITES Contracting Parties by extending offers of aid packages to developing countries. In the past this has been covert. In the mid-1980s, for example, Japan was embarrassed after it was discovered that they had put undue pressure on the Seychelles to back Japan's viewpoint at the IWC.²¹⁹⁰ However, Japan is currently fairly open about this policy - while not admitting to direct linkage of payments to votes, they *are* open about the fact that they hope to persuade sufficient countries to back their stance. To this end, Japan has put millions of dollars of foreign aid into the economies of nations such as St Vincent and the Grenadines, St Lucia, Grenada, the Dominican Republic, Antigua and the Solomon Islands.

At IWC 54 in 2002, Antigua and Barbuda, Grenada, St Lucia, Dominica, St Kitts and Nevis, Guinea, the Solomon Islands, Panama and (although abstaining strategically) Morocco²¹⁹¹ all supported Japanese proposals. Newer members Gabon, Benin, Palau and Mongolia also voted along with Japan. In October 2002, at the intersessional meeting of the IWC, when the vote was taken to admit Iceland, nine of the nineteen votes cast in favour of Iceland rejoining with a reservation on commercial whaling were, according to Greenpeace representative Page, 'from countries whose position in the IWC is directly linked to their receipt of fisheries grant aid from Japan'.²¹⁹² The vote was supported also by Norway, Sweden, Finland, Denmark and Switzerland. Switzerland's role is not typical of a developed and European country. Sweden, Finland and Denmark appear to have chosen Scandinavian over European Union unity - possibly an example of States acting in their self-interest.²¹⁹³

At the end of 2002, Masayuki Komatsu wrote in *ISANA* that at the annual meeting (IWC 54) 'six countries (Benin, Gabon, Mongolia, Palau, Portugal and San Marino) joined the IWC as new members, bringing the total number of members to 49, including Iceland, which rejoined the Commission last year but was treated as an observer by undue treatment of anti-whaling members'; and commented that '[a]long with the increase in members, the countries concurring with the Japanese position also increased steadily, giving a bright sign for improvement of the present anomalous state of the Commission'.²¹⁹⁴ As at February 2006, there were 66 members - representing a significant and fairly sudden surge. By IWC 59 in May 2007, there were 76 members.

Komatsu notes that at IWC 54 when Japan made a request for an interim quota for its coastal whaling communities, 'which [request] Japan has been presenting annually', the result of the vote fell short of a simple majority only by a small margin, with 20 in support and 21 against. He points out that a three-fourth majority vote is required for an amendment of the IWC

²¹⁹⁰ D Day *The Whale War* (1992) at 127-131.

²¹⁹¹ See (n 244).

²¹⁹² Enviro News Service (14 October 2002) <http://ens-news.com/ens/oct2002/2002-10-14-03.asp>.

²¹⁹³ See 3.3.9, 3.3.10 and Annex C.

²¹⁹⁴ M Komatsu 'What Was Achieved at the Shimonoseki IWC Meeting' *ISANA* No. 26, December 2002 www.whaling.jp/english/isana/no26_01.html.

Schedule, but argues that ‘the voting showed remarkable progress as compared with 10 years ago when I first joined the Japanese delegation to the IWC. At that time, only 5 countries, including Japan, supported the promotion of whaling’.²¹⁹⁵ ‘In face of this changing situation’, Komatsu continues, ‘the anti-whaling bloc is criticizing Japan for buying the votes of developing countries in exchange for its Official Development Aid (ODA). But Japan is now extending ODA to more than 150 countries, among them being anti-whaling countries, such as India, Brazil, Mexico and Kenya. The reason for the increase in the number of supporting countries for the cause of Japan is that Japan’s position based on scientific evidence has been accepted internationally’.²¹⁹⁶ It is, of course, likely that it has as much to do with aid - countries like Mongolia have nothing to do with whales, and hence have very little to lose.

16.1.2 The gulf between parties

Komatsu and Misaki argue that ‘Japan has a very real role to play in association with developing nations in the sustainable use of natural resources, indeed, ... it has a duty to do so’. They justify this by arguing that eventually people will come to ‘learn that sustainable utilization of natural food resources is the only path in the 21st century’; and that ‘the Japanese and Norwegian approach to multi-species management will be accepted’. ‘It will’, they suggest, ‘become the orthodox method of wildlife management quite simply because it works and it makes sense. This is the approach that will achieve what conservationists and environmentalists everywhere are calling for - it will save the planet! It is just a matter of time before Western nations realize that their approach has been wrong-headed’. They conclude by arguing that ‘[c]ommon sense must - and will - prevail’; and that ‘[c]ultural arrogance has had its day’.²¹⁹⁷

This is an interesting argument - as it turns on its head the assumption promoted by powerful environmental lobbies in the West that it is the Oriental countries which threaten the earth’s natural resources, and from whom those natural resources need to be ‘saved’. Worryingly, the argument shows something of how broad is the gulf between important protagonists.

‘Those who advocate a protectionist policy’, argue Komatsu and Misaki, ‘ignore one very simple fact: wildlife resources are renewable and can sustain controlled hunting. Conservation values, therefore, can be at one with sustainable use when one is considering a renewable resource, which is very different to the approach one would take with, for instance, mineral resources, which are not renewable’.²¹⁹⁸ Neither side in the debate is claiming to want to destroy biodiversity - this, that their positions are so far apart, is what makes resolution so difficult. They cannot both be correct.

On this issue Komatsu records that, ‘[f]urther, the Commission agreed at this [54th] meeting to introduce a 3-year provisional measure to alleviate the membership contributions of developing countries in its review of the current IWC contribution system’. Somewhat optimistically, he argues that ‘[a]s a consequence, it is expected that the IWC membership of developing countries sharing position on the sustainable use of marine living resources will be further promoted’. For this view, he offers two essential reasons: firstly, ‘the fact that the large amount

²¹⁹⁵ *Ibid.*

²¹⁹⁶ *Ibid.*

²¹⁹⁷ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 157-158.

²¹⁹⁸ *Ibid* at 153.

of fish consumed by whales came to light by Japan's research efforts'; and, secondly, the fact that the issue of whales is an issue of fisheries that should be recognized even by countries [which] do not engage in whaling as long as they are coastal and fishery-engaging states'.²¹⁹⁹

'It may be', writes McGuinness in May 2002, 'that Japan has finally decided to force the collapse of the nonfunctional IWC. It has successfully persuaded a number of other countries to agree with it. Whether this has involved payments, direct or indirect, hardly matters - it is standard practice in world politics for wealthy countries to bribe poor countries (unfortunately, most of the money goes to the privileged classes, not to relieving poverty)'.²²⁰⁰ McGuinness was wrong about Japan forcing the IWC's collapse at the time; but it is something that might yet happen - Japan has on several subsequent occasions hinted strongly that it might leave the IWC, particularly in 2003 and 2007.²²⁰¹

Friedheim concurs generally, writing that '[t]here are adequate substitutes for whales, and therefore ethics count more than utility'. 'After all', he suggests, 'the governments of Japan, Norway, Canada, and other developed states whose citizens still kill whales easily can provide substitutes - beef, for example'. As explanation for why whales have such importance, in any case, he suggests that '[f]or other individuals, especially those in the resource management, environment, or conservation departments of major governments, NGOs, or academies with knowledge or experience in ocean resource management, the major attraction of a preservation regime is that it has been relatively easy to enforce. It is either/or - either whale products are off the world market, a fact easily discerned, or whale products are on the world market'.²²⁰²

It is, however, the present writer's very strongly held view that Friedheim is wrong and that there *are* no 'adequate substitutes for whales' - at least, not in the sea as there is far too little life left in the sea.²²⁰³

The nature of the 'ecological' debate is changing. Kalland writes that '[f]or many years an ecological discourse dominated the rhetoric: whales were believed to be endangered, and the moratorium was introduced in the name of conservation'; conservation here meaning 'preservation'. More recently, however, according to Kalland, there is greater knowledge of the population status of some whale stocks. He then explains that this knowledge has apparently 'caused some groups, but by no means all, to switch from an ecological discourse to one based on animal welfare', whilst at the same time these groups have turned to fostering the image of what Kalland calls a 'super-whale' - a beast which 'combines traits from a number of different species of cetaceans as well as from human beings. ... the super-whale has taken on a life of its own as a commodity'.²²⁰⁴

²¹⁹⁹ M Komatsu 'What Was Achieved at the Shimonoseki IWC Meeting' *ISANA* No. 26, December 2002

www.whaling.jp/english/isana/no26_01.html.

²²⁰⁰ P P McGuinness 'Whale-Huggers' Case is Up the Spout' *Sydney Morning Herald* 28 May 2002 in *ISANA* No.26, December 2002 www.whaling.jp/english/isana/no26_03.html.

²²⁰¹ See 3.3.12 and 3.3.31.

²²⁰² 'R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 12-13.

²²⁰³ See 11.3.

²²⁰⁴ A Kalland 'Whose Whale is That? Diverting the Commodity Path' in M M R Freeman & U P Kreuter (eds) (1994) 159 at 159.

‘The deeply divisive political dimension to IWC proceedings’, write Burns and Wandesforde-Smith, ‘was also apparent [in 2002] when Japan was excoriated at both meetings for its alleged strategy of buying votes through overseas development assistance, especially to island States in the Caribbean’.²²⁰⁵ The same writers cite a report in *The Economist* which observed that the ‘[Organization of Eastern Caribbean States (OECS)] make up almost one-sixth of the [IWC], though none has a whaling industry. They vote with Japan to block proposed whale sanctuaries, while at home they promote eco-tourism, including whale watching. But Japan has been generous: it has given several million dollars to each island for fisheries projects’.²²⁰⁶ ‘At the start of IWC 54’, continue the same writers, ‘much attention focused on six new members of the Commission: Benin, Gabon, Mongolia, Palau, Portugal and San Marino. Mongolia and San Marino are both land-locked countries. In the 15 votes taken at IWC 54, Benin, Gabon, Mongolia and Palau consistently voted with Japan and the pro-whaling faction. Whether this represents bribery remains a controversial and unresolved issue’.²²⁰⁷

DeSombre says that there are two main factors which have historically contributed to the IWC’s current difficulties providing governance. The first of these factors, she suggests, is ‘the underlying problem of incompatible goals among the actors involved in making and influencing policy with respect to whaling. Some do not accept the premise that whaling is ever acceptable, and others are reluctant to accept any restrictions on their ability to hunt whales’. ‘Other international agreements, such as [CITES]’, she continues, ‘have been able to withstand fundamental differences of opinion among their members about the acceptable uses for resources’. The second factor contributing to the current difficulties in the IWC, according to DeSombre, ‘is the membership and voting structure of the organization and the ways in which membership has become a tool through which to influence whaling policy’.²²⁰⁸

There are some important differences between CITES and the ICRW - one of which is that CITES appears to have been better able to accommodate opposing interests; however, there do remain fundamental differences of opinion within that body.

DeSombre argues that states ‘have waged their battles in the IWC through collecting votes and threatening those who do not follow the policies they want, rather than by persuading others of the value of their positions’.²²⁰⁹ She explains that the economic threats made by the US were sufficient to get the moratorium in place with support even from those who did not originally agree with it. She then concedes that ‘[t]here is little question that the moratorium assisted in the regeneration of some stocks to the point that sustainable hunting might eventually be possible’; but then argues that ‘the way in which this policy was created now means that global governance is unlikely to be based on anything but bullying and bribing’.²²¹⁰

²²⁰⁵ W C G Burns & G Wandesforde-Smith ‘The International Whaling Commission and the Future of Cetaceans in a Changing World’ (2002) 11:2 *RECIEL* 199 at 199.

²²⁰⁶ *Ibid* at 199, fn 6 citing ‘Votes for Hire’ *The Economist* 6 September 2001

http://www.economist.com/displayStory.cfm?Story_ID=771465.

²²⁰⁷ *Ibid* at 199-200, fn 6.

²²⁰⁸ E DeSombre ‘Distorting Global Governance: Membership, Voting, and the IWC’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 183 at 184-85. DeSombre writes that ‘[t]he use of membership as a tool has two components. The first is the process, undertaken primarily but not exclusively by the United States, of bullying states into the agreement, or into changing their policies within the agreement. The second is the effort undertaken by a number of states and [NGOs] to “bribe” states into the agreement, by paying their dues or representing them at meetings, or offering them foreign aid to take certain positions’. *Ibid* at 184-85.

²²⁰⁹ *Ibid* at 185-86.

²²¹⁰ *Ibid* at 185-86.

The observer must surely have some sympathy here for the United States. The moratorium *was* needed, it seems - and the question must be asked whether it could have come about in any other way.

16.1.3 The numbers race

It has been suggested that environmental groups have tried to bring into the organization states with no previous history of, or current interest in, whaling. DeSombre, however, goes perhaps a little too far, implying that anti-whaling countries bought the votes of new members; writing that '[a]lthough buying states into the agreement is difficult to substantiate, there are a number of states in the agreement that have traditionally not cared about whaling, that joined in the time period when a commercial whaling moratorium was being discussed in the organization. Antigua and Barbuda, Oman, Egypt, and Kenya, for example, are all states that joined in the early 1980s, with no previous history of concern about whaling issues, that voted consistently against commercial whaling'.²²¹¹ Probably she is wrong to insinuate that these states were 'bought' by the anti-whaling bloc; but would have been right had she suggested that they were brought in with inducements such as hints of good favour. The reasons why states join are often not clear at all; and the example of countries like Antigua and Barbuda, which has now 'switched sides', shows how complicated such analysis can be.

This appears to be the way the anti-whaling bloc - largely, the Western States - started the 'membership arms race.' The irony of criticisms of the Japanese approach, of course, is that it is because of the presence on the IWC of non-whaling countries (such as Austria and Switzerland [although, of course, Switzerland abstained on the moratorium vote in 1982; and Oman and the Seychelles would be better examples]) that the anti-whaling bloc managed originally to gain a positive vote for the present moratorium on commercial whaling.

DeSombre concedes that there is no inherent reason why non-whaling states should not have an interest in protecting certain species or in working to establish international norms for sustainable use. However, she says, 'to the extent that these states are being used as part of a strategy of bribing them to join or take particular positions within the IWC, the governance of the organization suffers'.²²¹²

This raises an important issue - positions have been blurred by politics, and it is not always easy (or even possible, sometimes) to tell whether a member State is acting in its own interest, in the interest of another state, or - as it will probably be professing to do - in the interest of all states and conservation generally.

16.1.4 Pressure by the United States

DeSombre argues that '[b]ullying states - primarily the United States, though others have used this strategy to a lesser extent - have attempted to bring states into the IWC, and to influence their policies within the organization, through threats of economic harm.' She alleges that at least three states 'can be seen to have joined the agreement because of this pressure, and

²²¹¹ *Ibid* at 187.

²²¹² *Ibid* at 188-89.

another several have made important changes in whaling policies in response to these threats'.²²¹³ She is criticising the politics of the United States - but the Japanese tried to bully the Seychelles in the early eighties.²²¹⁴ Coercion is therefore a tactic used by both sides, as much as has been 'cajolery'.

The United States has on occasion used, or at least threatened to use, its domestic legislation to 'bully' other ICRW members. Per DeSombre, '[n]ote that a state can be in full compliance with international law and IWC policies and still be certified under these pieces of legislation'. She explains that either a state which is not a member of an agreement (and therefore has no obligations under it), or a state that has followed the legal procedures to opt out of certain obligations (and likewise is not bound by such obligations), can still be considered to be 'diminishing the effectiveness' of an agreement. Such 'diminishing' might then trigger US sanctions. 'In all cases', says DeSombre, the states that the US has certified under its domestic legislation 'were acting in ways technically both legal and consistent with IWC policy'.²²¹⁵

DeSombre then writes that, '[i]mportantly, the efforts by the anti-whaling states to change membership and voting practices are what made the protection of whale stocks possible'; since '[a]s new nonwhaling members joined, votes for zero catch limits for some species (sperm whales in 1981 for instance) became possible'. She records that, while some whaling states ceased commercial whaling and became willing to vote in favor of restrictions on whaling, the majority of new votes against commercial whaling came from new members; culminating in the passing of the moratorium on commercial whaling, once numbers had shifted sufficiently.²²¹⁶

The arguments which DeSombre makes are sometimes a little difficult to follow; such as when she writes that '[i]t is essential to note that, even though at points in the recent history of whaling regulations a number of whale stocks had been so thoroughly overhunted that whalers could not even catch the quotas they agreed to, whaling states vigorously fought the moratorium'. Without external pressure by states voting in favor of a moratorium, she says, 'a cessation in commercial whaling would never have come about'.²²¹⁷ This last point of DeSombre's echoes the point made by this writer above, that pressure by the US and other anti-whaling countries in the late 1970s and early 1980s was required; and that had such pressure not been exerted whaling countries would have done even more damage to whale populations than they in fact did. Probably, also, DeSombre vastly overstates the effect of US threats to use its domestic legislation against other states.²²¹⁸

'Similarly', writes DeSombre, 'the increase in Japanese, Norwegian, and Icelandic lethal scientific whaling came as their commercial whaling opportunities decreased; they thus moved from an activity the IWC was allowed to oversee to one that it had no legal rights to

²²¹³ *Ibid* at 189.

²²¹⁴ D Day *The Whale War* (2nd ed, 1992) at 128-131.

²²¹⁵ E DeSombre 'Distorting Global Governance: Membership, Voting, and the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 183 at 189-91.

²²¹⁶ *Ibid* at 192.

²²¹⁷ *Ibid* at 192-93.

²²¹⁸ See 8.4 and 8.4.3.

regulate'.²²¹⁹ Again, this does not support her argument that the US and other anti-whaling countries ought to be excoriated as 'bullies' who subverted international law.

All of this is fair enough; but the impartial observer might ask what the alternative might have been. In a way, this reminds the present writer of the villagers and Wildlife Service officials at the Chobe Enclave Trust in Botswana who, at a meeting which the writer attended, complained that CITES prevents them from selling more than just a few elephants annually ... without apparently recognising that without the CITES Appendix I listing there might today, perhaps, be so few elephants that they would not have even the benefit of those few.²²²⁰

It seems sometimes to the present writer that it is 'ecosystems' of international law what we might need to begin to consider. As we begin to realise that we cannot single out only certain species for protection, or for use,²²²¹ so we might begin to realise (perhaps) that single states cannot run things - and other states (all, even?) need to be involved, or at least to have their interests considered. The same considerations must arise in respect of sovereignty; of common resources; and of elephants.

This is a contentious thing, however - different parties within the IWC have ideas about democracy and transparency that are as opposed as are their views on conservation. Continuing to consider these differences of democratic understanding is important. Further, in the opinion of the present writer, this points also to the importance of considering the IWC for a proper understanding of international environmental treaties - its usefulness in this regard lies in the very fact that it has arguably become dysfunctional.

16.1.5 Different views of democracy and bona fides

Charges of bad faith are regularly made. Iino and Goodman contend that '[i]t is a fundamental obligation that states under customary international law exercise good faith vis-à-vis treaties into which they have entered (*pacta sunt servanda*)' and that 'Article 31 of the Vienna Convention on the Law of Treaties reflects customary international law on treaty interpretation, and is thus germane to determining the parameters of the rights and obligations of parties to the ICRW'. These two writers record that Article 31 states that '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose';²²²² and then argue that IWC members, therefore, 'have an obligation to promote, and refrain from defeating, the object and purpose of the ICRW'. The ICRW's object and purpose, they explain, is 'to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry'. The implication they seek to draw is that anti-whaling states are acting in breach of the Vienna Convention by opposing commercial whaling. To this point, their argument has been made many times by pro-whaling states at the IWC. They go further, however, and argue that the actions, of a member state which violate the object and purpose of a treaty constitute 'a material breach'; and 'may induce termination or suspension of the operation of the ICRW'.

²²¹⁹ E DeSombre 'Distorting Global Governance: Membership, Voting, and the IWC' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 183 at 192-93.

²²²⁰ See (n 470), (n 933), (n 1226), (n 1623) and (n 1658).

²²²¹ See 2.4.

²²²² Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 13-14.

They conclude that '[w]hen such a violation has been made by a decision of the IWC itself, the action in question is legally invalid and therefore void'.²²²³

With their last contention they go too far. The trouble is that their contention simply brings us back to arguments about the meaning of conservation - and indeed about what the treaty object is. Further, claiming that the IWC's actions are 'void' (as opposed to the question of whether they *ought* to be void) is - in practice - simply meaningless ... as with the similar argument by Jacobson's, discussed earlier.²²²⁴

Despite these alleged problems of legality, write Iino and Goodman, the majority of IWC members, allegedly relying 'primarily' on the views of Professor Patricia Birnie, 'seek to justify the decisions on the Southern Ocean Sanctuary', which pro-whaling states do not wish to recognise, by arguing that - because the ICRW lacks dispute settlement provisions - 'the Commission's decision on the Sanctuary, taken through use of the normal voting procedures laid down in Article V, is determinative'.²²²⁵

Whether the Southern Ocean Sanctuary *is* indeed binding on all members remains an open question. Certainly, it is a difficult argument to make that it is binding on member states which have formally objected to it. This does show how difficult it can be to overcome the resistance of states within multilateral environmental treaties. Per Friedheim, 'important roles are often delimited by the power of the participating state. Nevertheless, since all have a right to participate, to be heard, and to vote, and all have to be accounted for, decision making is cumbersome'.²²²⁶ Not only is it cumbersome, it might sometimes be impossible; given the nature of sovereign states, especially where they have the right to object to decisions made by majority.

A good example of the gulf between the opposing parties can be seen in their approaches to democracy (or at least to 'transparency') in the IWC. As Komatsu and Misaki write, '[w]e have realized that more transparency of the proceedings [of the IWC] is necessary so that the public becomes aware of what is actually going on in the IWC where the majority flouts the Convention in an unfair and disrespectful manner'. Anti-whaling forces, they say, have also insisted that 'transparency' is necessary; but add that such forces interpret 'transparency' based on their opposition 'to the introduction of secret ballots so that they could put pressure on any countries that may vote against their liking'. This interpretation of 'transparency', say these writers, 'was their rationale for opposing the introduction of secret ballots'. They then explain that Japan believes that 'transparency' through the media is what is necessary. They advise that since it was first established the IWC has used an open ballot system, with voting being 'heard by voice response around the table'. The harm this causes, they say, is that it has become increasingly difficult for any nations that want to vote in support of pro-whaling proposals in the recent years at the IWC; the problem being that 'the anti-whaling observers harass the

²²²³ *Ibid* at 13-14.

²²²⁴ See 3.2.18, (n 417), (n 867) and (n 878).

²²²⁵ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 14-15. 'Clearly', write Iino and Goodman, 'this is in contradiction with the principles of customary international law on interpretation of treaties described above, with the absurd inference that the IWC may decide what it likes irrespective of the objectives and purposes of the ICRW'. *Ibid* at 14-15. The argument that the IWC is simply deciding 'what it likes irrespective' is far too simplistic, however.

²²²⁶ R L Friedheim 'Negotiating in the IWC Environment' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 200 at 204.

supporters of whaling'. By comparison, they argue, at CITES 'where a large number of developing nations participate in the ballot', the secret ballot is used 'in order to protect the sovereign rights of the nations'. Japan, they conclude, 'believes that a secret ballot is the basis for democracy'.²²²⁷

Other pro-whaling writers take the same line. It has been suggested by Iino and Goodman, for instance, that Japan has, since 1997, proposed that the IWC make use of secret ballots.²²²⁸ According to these writers, 'Japan's proposals have been made in an attempt to protect the rights of contracting parties to express their views freely, without fear of coercion or reprisals and in accordance with democratic procedures'.²²²⁹ They do not, however, offer any proof that there are real grounds for pro-whaling countries to fear coercion or reprisals - the allegation remains unsubstantiated and, arguably, unprovable.

At IWC 51 in 1999, the matter of the secret ballot was debated, in the context of election of officers of the IWC. The US argued in favour of 'transparency', as did Brazil, Italy and Finland, and 'recalled the long history of open debate'. Germany agreed. Denmark 'preferred the maximum transparency as a general rule and opposed a secret ballot'. New Zealand argued that 'since views were well known, a secret vote is not necessary to protect anyone's position'. Sweden, the Solomon Islands and the Netherlands agreed. Norway proposed that the secret ballot should be 'upon request by a Commissioner' and that 'if at least five Commissioners so request any other vote shall proceed by secret ballot' - a proposal which was supported by Japan. Antigua and Barbuda 'spoke of the countries vulnerable to threats by individuals and organisations'; and supported the view of Norway, 'so as to vote without fear'. Of Norway's two suggestions the first was adopted by majority, the second was not.²²³⁰

Japan, Iino and Goodman argue, is of the view that 'the Commission's current voting not only subject[s] the rights of contracting parties to undue pressure from other members nations and NGOs but that the current procedures unduly influence the Commission's decisions on matters of fundamental importance'. For these reasons, they argue, the use of secret ballots 'for deciding substantive matters' is provided for in many international commissions and organizations; as examples of which they list [CCAMLR], the [CMS] and the International Commission for the Conservation of Atlantic Tunas [ICCAT].²²³¹ Japan further, they say, 'argues that the use of secret ballots does not conflict with the need for transparency'. Transparency, they conclude, 'does not mean that the individual votes of all members must, on every occasion, be made public'; and '[a] secret ballot would not prevent those members of the IWC who would wish to disclose how they voted on any issue from doing so'.²²³² Of course, if this did happen and states which had voted in one direction disclosed their votes, it would become apparent by necessary implication how the states which did not wish to disclose their votes had in fact voted. It is likely also that at state level it would be quite clear how states had voted - and ultimately the only persons who would be left in the dark would be individual citizens.

²²²⁷ M Komatsu & S Misaki *The Truth Behind the Whaling Dispute* (2001) at 156-7.

²²²⁸ Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 30-31.

²²²⁹ *Ibid* at 39, fn 97.

²²³⁰ IWC 'Chairman's Report of the Fifty-First Annual Meeting' (24-28 May 1999, Grenada) at 48.

²²³¹ See, generally, <http://www.iccat.int>.

²²³² Y Iino & D Goodman 'Japan's Position in the International Whaling Commission' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 3 at 30-31.

This argument made by Iino and Goodman does not, of course, take into account transparency between a member and its own people. Ultimately, it might well be questioned whether this is this a consideration that can be ignored.

In the final analysis, unfortunately, these radical disagreements as to basic concepts and processes bode ill for resolution of deeper questions concerning use of natural resources.

16.1.6 The controversy

Discussion of membership of the ICRW/IWC means discussion of one of the most contentious issues alive in the context of whaling - and arguably even in international law generally. Allegations of coercion, bullying, bribery, blackmail and underhand tactics fly. This is extremely ironic; given that the ICRW provides that any state may become a member, not just states which actively engage (or once engaged) in whaling, and is thus apparently a very inclusive convention by nature.

In the initial decades of the IWC, adherence by new member states occurred slowly only. The current moratorium on commercial whaling was the spur to the first of three rapid expansions of membership. According to Dahmani, writing in the mid-1980s, '[s]o far 26 countries have joined to increase the Commission's membership to 40 states ... [t]hese countries have no interest in commercial whaling ... [t]heir motive for joining the Commission must be to press and vote for strict restrictions on whaling'.²²³³ Gambell writes that 'from 1976 to 1982, 24 governments adhered to the [ICRW] and thus became members of the IWC'; and that '[o]f these, 18 voted for the introduction of zero catch limits, two were opposed and four abstained'.²²³⁴

Allied to the adherence of new members are questions of procedure and how voting should be done. These questions are not insignificant and merely procedural; the divisions and disputes over them go to the very heart of the impasse between pro- and anti-whaling states - and to the possibility of resolution of this impasse.

Komatsu and Misaki write, for example, that it was originally Japan that, '[i]n order to expose some of the games being played by the anti-whaling bloc', sought to give the media access to Commission's proceedings - 'something that was opposed by much of the anti-whaling bloc'. Despite this opposition, they write, 'since the 2000 annual meeting, the IWC had come under public scrutiny'.²²³⁵ It is ironic, given this comment, to consider the words of the Commissioner for the US at IWC 25, in 1973. He said that '[w]e are deeply disappointed with the fact that the Press has not been allowed to attend our meeting. ... I think that what we are about in this Commission is important to all the peoples of the world, and I believe they should be kept thoroughly informed of what is going on here'.²²³⁶

²²³³ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 113.

²²³⁴ R Gambell 'I Am Here, Where Should I Be?' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 65 at 70-71.

²²³⁵ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 115. The same writers explain that '[t]his in itself was a revolution, as since the 1970s no media coverage of the proceedings had been allowed; ... and that '[s]ince the 2000 IWC meeting, television and the Internet have opened the IWC up to the world'. *Ibid* at 115.

²²³⁶ Dr R White, USA, IWC Report of the Plenary Sessions (from 25 June 1973) *Verbatim Record* at 24.

Komatsu and Misaki continue; arguing that for the IWC to function ‘as it should’, all of its members should be given the opportunity to make their views known. Their argument is that recent times have seen domination of decision-making by the ‘major developed nations’. ‘To counter this, and to give smaller nations a clearer voice’, they argue, Japan has proposed introducing a secret ballot system to replace the open ballot system which the IWC has always used. Their assessment is that the ‘secret ballot system cannot come soon enough’ as it ‘will enable votes to be cast as they should - without fear or favor’; and that ‘[a]s one would expect, the anti-whaling bloc is opposing the secret ballot system’, apparently arguing that ‘voice’ voting is more transparent.²²³⁷

Lapointe writes that ‘[m]uch pressure could be removed from member States if they adopted Secret Ballots that could be used whenever the sovereignty of the Parties or the integrity of the Convention appeared to be in jeopardy’. The voting rights of people and nations, he argues, ‘should always remain sacred’; and, perhaps somewhat over-dramatically, ‘[a]nyone opposing this notion and/or attempting to block its realization either has a hidden agenda or is guilty of a crime against humanity’. Lapointe contends that ‘[o]pponents of the secret ballot say it would diminish the so-called transparency of the proceedings and destroy the credibility of the nation’; but that ‘[t]his is not true’ as, ‘[t]o begin with, the actions of a delegation must be transparent to its own government ... [b]ut no delegates should be obliged to explain their voting behavior to delegates from other countries or to NGOs!’. The only real benefit, he says, ‘to open voting is that it permits coercion and pressure on smaller nations from more powerful nations and wealthy NGOs’. International groups, he then adds, are starting to make use of secret ballots as a means of protecting their members ‘from coercion by activist groups’. It is important, he explains, ‘to ensure that a delegate’s vote reflects principles, and not fear of reprisal’; and gives as examples of institutions allowing secret ballots CITES, the CMS, the Vienna Convention for the Protection of the Ozone Layer, and adds that there are ‘many others’.²²³⁸

16.2 The numbers game

16.2.1 Members and coalitions

Many countries which have historically had no interest in whaling are members. The question must be asked why a country like Mali, to take a random example, chooses to join? To throw money away? To make enemies by stepping into a stormy debate in which it has no interests at stake?

‘The more successful coalition’, as described by Friedheim, calls itself (or at least its governments seem to) the ‘like-minded states’; with its principal members being the US, the UK, France, Germany, Australia, and New Zealand, ‘with significant support from the Netherlands and Italy’.²²³⁹ This coalition, according to Friedheim, can ‘usually command a core vote of about [20] to [23] states from a total membership that has varied from [35] to [39] in

²²³⁷ *Ibid* at 116-117.

²²³⁸ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 56-57.

²²³⁹ See 3.3.26.

recent years. It can usually pick up enough swing votes to allow it to control IWC decisions, even three-quarter majority decisions'.²²⁴⁰

At IWC 51 in 1999, held in Grenada, Japan suggested in its written Opening Statement that '[w]e from Japan feel very close to the people of the Caribbean who, like us, live on small islands and depend upon the sea for much of their food resources'. Caribbean countries, Japan then argued, 'are assuming an important role in the management of the world's living marine resources' and '[t]heir contributions deserve recognition and respect'.²²⁴¹

Chasek and Fry have both suggested that small island states are beginning to assert themselves and to try to present a unified negotiating bloc in multilateral environmental *fora*. As Chasek writes, '[i]nternational environmental negotiations are likely to be a complex mix of conventional bargaining and coercive pressure applied by the more powerful actors'; but that, for small island countries, coalitions may help to increase their bargaining power within.²²⁴² The Alliance of Small Island States (AOSIS),²²⁴³ formed in 1990, is a coalition of (currently, 43) small island and low-lying coastal states and observers; unified, at least in large part, by common environmental concerns - the threat of global warming in particular.²²⁴⁴ Countries which are members of both AOSIS and the IWC include Antigua and Barbuda, Belize, Dominica, Grenada, Guinea-Bissau, Kiribati, the Marshall Islands, Nauru, Palau, Seychelles, the Solomon Islands, St Kitts and Nevis, St Lucia, St Vincent and the Grenadines, Suriname, and Tuvalu.²²⁴⁵

Fry has described small island developing states as being 'quite an eclectic group of countries'; with there being no internationally agreed definition for them, some of them not being small (Cuba, for example) and some not being developing countries (Singapore, for example).²²⁴⁶ Fry makes the interesting contention that small island developing states are particularly keen on binding legal arrangements and regulation; ascribing this to their high vulnerability to factors beyond their control.²²⁴⁷ Unfortunately, however, as Fry does point out, in the environmental context, most international instruments have the status of 'soft' law.²²⁴⁸

This implies that small island states may have reasons related to deeply-held environmental concerns, rather than to pure short-term environmental interest, for IWC membership. Some people remain cynical, however; and it may also be that, at least in the IWC context, it is a coalition that might crack quite easily under pressure brought by developed Western countries - in particular, from former colonial powers like the UK and France.

²²⁴⁰ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 12. He then suggests that the 'preservation position these states espouse' gains support from significant NGOs; being supported by, amongst others, Greenpeace, World Wildlife Fund, the International Fund for Animal Welfare, the Center for Marine Conservation, the Environmental Investigation Agency, the International Wildlife Coalition, and many 'smaller, single-issue organizations' such as Whale and Dolphin Conservation Society, International Dolphin Watch, and others. *Ibid.*

²²⁴¹ IWC 'Opening Statements of the Fifty-First Annual Meeting' (24-28 May 1999, Grenada); written Opening Statement by: Japan (IWC/51/OS/JAPAN).

²²⁴² P S Chasek 'Margins of Power: Coalition Building and Coalition Maintenance of the South Pacific Island States and the Alliance of Small Island States' (2005) 14:2 *RECIEL* 125 at 126.

²²⁴³ See, generally, <http://www.sidsnet.org/aosis>.

²²⁴⁴ P S Chasek 'Margins of Power: Coalition Building and Coalition Maintenance of the South Pacific Island States and the Alliance of Small Island States' (2005) 14:2 *RECIEL* 125 at 131.

²²⁴⁵ *Ibid* at 132.

²²⁴⁶ I Fry 'Small Island Developing States: Becalmed in a Sea of Soft Law' (2005) 14:2 *RECIEL* 89 at 89.

²²⁴⁷ *Ibid* at 90.

²²⁴⁸ *Ibid* at 90.

The present writer asked Horst Kleinschmidt whether he felt that the increased adherence of small states implied that this indicates that this - sustainable use - is the way in which the world is moving. Kleinschmidt replied that he felt that it was:

simply pressure by Japan on them ... and I think their contribution to the debate at the Commission is nearly zero ... they don't add value to the debate ... their only tactical contribution, and it helps Japan, [is to] 'smell colonialism' ... to attack countries that they see as the colonialists ... smell racial hatred behind everything and stop debates over that ... gratuitously, completely gratuitously ... they would treat me and my deputy (white South Africans) often as 'South Africa, oh, where is that in Europe?' ... So, nastiness, but no substance ... I always used to say to them, if there was whaling again, you wouldn't have a show, how would you participate in this? You haven't got a chance at going whaling, at all ... you would have Japanese crews to do this for whatever quota you got and you would get nothing out of it ... as you don't from so many other things that you've got a gripe about ... so what's your point? ...²²⁴⁹

I then asked Kleinschmidt whether he thought the small country support for Japan was as simple as bribery; or whether these countries might themselves be starting to recognise the interconnected nature of things? His answer was that:

I really don't think so ... if I saw seriously debated issues, trying to, for example, say how does this help us to wean ourselves from our Colonial past? How does this change other issues? Instead ... very, very feeble delegations ... the very person who made the country, St Kitts and Nevis ... the person who was top was also the delegate to the Commission ... and goes shopping all the time ... on a Japanese credit card, I imagine ... and nothing to offer ... a completely empty debate, and an embarrassment ...²²⁵⁰

It has been suggested by Friedheim, writing in 2001, that the coalition of states which support a controlled resumption of commercial whaling is the smaller coalition; and it is generally a politically weaker grouping, with only two countries being major players in world politics. These latter two being 'Japan, for its economic might (the world's second largest economy), and Norway for its wealth *per capita* and its environmental record'.²²⁵¹ He then suggests that, despite occasional cooperation, this group has rarely been able to present a 'united coalition strategy'; Norway in particular, he suggests, has been 'criticized by some of the others for going its own way and taking care of its own interests without regard to the needs of other coalition members'.²²⁵²

As above in relation to France, under the topic of whale sanctuaries,²²⁵³ the charge has been made that certain states use their membership of the IWC, and their stances on whaling, to gain themselves undeserved environmental credibility. Andresen writes that '[m]ost of the anti[-]whaling states cannot brag about particularly favorable international environmental profiles, making the whaling issue a free ticket to improve their environmental images'.²²⁵⁴ Russia, he argues, 'played a passive role for many years after it quit commercial whaling in 1987, usually sending only one delegate to IWC meetings'; but that '[m]ore recently it has become more active, as witnessed by the deal with the United States on aboriginal catch at the 1997 IWC meeting'.²²⁵⁵ Although Russia, he continues, 'has been rather passive so far, it is a potentially

²²⁴⁹ *Personal communication* Interview with Horst Kleinschmidt, Cape Town, 7 November 2006; E Couzens.

²²⁵⁰ *Ibid.*

²²⁵¹ R L Friedheim 'The IWC as a Contested Regime' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3, at 15.

²²⁵² *Ibid* at 15.

²²⁵³ See 15.3.

²²⁵⁴ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 251-52.

²²⁵⁵ This is a reference to the fact that the Russian Federation and the United States put forward a joint application for an ASW catch. This is not any longer a contentious matter, however - in both 2002 and 2007 the two member states put forward joint applications. See 10.

interesting actor because of its whaling tradition, its observer status in NAMMCO, and its reservation against the 1982 moratorium, which has not been withdrawn'.²²⁵⁶

Andresen argues particularly that '[t]he United States has been by far the most important actor in changing the IWC to bring about an end to commercial whaling'. In order to protect its own interests, he argues, the US was also the 'main architect' behind the 'double standard' system of distinguishing between permissible and impermissible whaling. Although the US, he continues, 'has been the *group leader* for the anti-whaling forces, it hardly qualifies as an *entrepreneurial* leader, as all this has taken place at the expense of an opposing minority'. His conclusion, however, is that 'if a compromise is to be achieved, the [US] is the only actor that can bring it about'; or, putting it another way, 'if the [US] does not play a key role in the process, nothing will come out of it unless the outcome is acceptable to the [US]'.²²⁵⁷ Andresen then explains that 'the main reason for Norway's successful resumption of whaling was *not* increased understanding for the Norwegian position by the environmental movement or the IWC majority, but rather, it was a *tacit but de facto acceptance by the [US]*'; in return for which acceptance, he speculates, 'Norway probably had to promise that it would continue to operate within the IWC'.²²⁵⁸

On the position of the United States, Andresen argues that, while in a difficult position, the country remains one of the most important actors. There is, he says, 'some debate over the whaling question in the [US] ... Also, as a whaling nation, the [US] cannot use the same moral arguments against whaling as most other anti-whaling nations can'. He argues also that, 'as the remaining superpower, the [US], at least in principle, should be concerned with the orderliness of global governance'. In conclusion, he argues that the role and interests of the US are therefore quite different from most other anti-whaling states; with interests being 'essentially monolithic in most anti-whaling countries', but in the US being broader and more diversified. Moreover, he adds, the US 'is the only actor capable of changing the present rules of the game'.²²⁵⁹

This assessment might be overly categoric. The argument can be made that the world is changing around the IWC as more countries move toward philosophies of sustainable usage. Komatsu and Misaki write that '[a] significant development in the past 20 years, is that some of those nations that originally backed the moratorium now stand clearly in favor of sustainable whaling'; and that, in addition, 'a number of nations that support the principle of sustainable fisheries have since joined the IWC and support Japan'.²²⁶⁰ In 2003, they argue, 'the sustainable user group is on the rise, because of the weight of evidence brought forward by the national and IWC research and science, many other nations, such as Russia, China, Korea and various Caribbean nations, who know that they too need to fully utilize their marine resources are

²²⁵⁶ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 251-52.

²²⁵⁷ See 3.3.25 and 3.3.26.

²²⁵⁸ S Andresen 'The Whaling Regime: "Good" Institutions but "Bad" politics?' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 235 at 253.

²²⁵⁹ *Ibid* at 253-54. Andresen comments, though, that '[a]s the US whaling policy, along with most other US foreign policy, is basically domestically driven, there has to be a major change within and among domestic coalitions for a new policy to come about on the whaling issue'. *Ibid* at 253-54.

²²⁶⁰ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 118-119.

supporting the principle of utilization of whale resources based upon the scientific evidence'.²²⁶¹

16.2.2 The membership race

As at June 2006, there were 70 member nations to the ICRW.²²⁶² There was therefore a sudden surge in membership at the beginning of the 21st. What this does tell us, if nothing else, is that whaling is not something in which few people are interested - in fact it is an extremely active debate. This might be seen as strange, given that not many states would appear at first glance to have direct stakes in whaling.²²⁶³ Newly joined states in 2006 included Cambodia, Guatemala, Israel and the Marshall Islands. Subsequent to the 2006 IWC meeting; several new countries have joined - as new European Union members it is expected that they will take anti-whaling stances. These include Croatia, Cyprus, Greece and Slovenia. In 2007, even more states joined - including Laos, Cyprus and Israel. There were 76 member states at the time of IWC 59. Since then, even more have joined - such as Romania, in April 2008, and Lithuania in November 2008 - and by December 2008 there were 83 members.²²⁶⁴

The 17 African member states are:

Benin (2002); Cameroon (2005); Democratic Rep of Congo (2008); Côte d'Ivoire (2004); Eritrea (2007); Gabon (2002); The Gambia (2005); Guinea-Bissau (2007); Rep of Guinea (2000); Kenya (1981); Mali (2004); Mauritania (2003); Morocco (2001); Senegal (1982); South Africa (1948); Tanzania (2008); Togo (2005).²²⁶⁵

The 13 American/South American member states are:

Argentina (1960); Brazil (1974); Chile (1979); Costa Rica (1981); Ecuador (2007); Guatemala (2006); Mexico (1949); Nicaragua (2003); Panama (2001); Peru (1979); Suriname (2004); Uruguay (2007); the US (1948).

The 7 Caribbean member states are:

Antigua and Barbuda (1982); Belize (2003); Dominica (1992); Grenada (1993); St Kitts and Nevis (1992); St Lucia (1981); St Vincent and The Grenadines (1981).

The 28 European member states are:

Austria (1994); Belgium (2004); Croatia (2007); Cyprus (2007); Czech Republic (2005); Denmark (1950); Finland (1983); France (1948); Germany (1982); Greece (2007); Hungary (2004); Iceland (2002); Ireland (1985); Italy (1998); Rep of Lithuania (2008); Luxembourg (2005); Monaco (1982); Netherlands (1977); Norway (1948); Portugal (2002); Romania (2008); San Marino (2002); Slovak Republic (2005); Slovenia (2006); Spain (1979); Sweden (1979); Switzerland (1980); UK (1948).

The 10 Asian/Mid-East member states are:

Cambodia (2006); PR of China (1980); India (1981); Israel (2006); Japan (1951); Rep of Korea (1978); Laos (2007); Mongolia (2002); Oman (1980); Russian Fed (1948).

The 8 Pacific/Oceania member states are:

²²⁶¹ *Ibid* at 118-119.

²²⁶² See <http://www.iwcoffice.org/commission/members.htm> (accessed 17 February 2006).

²²⁶³ It is interesting, although pure speculation, to note that the commissioner for Kiribati was a 'Mr M Kamatie' in 2006; and the commissioner for the Rep of Palau is the 'Hon K Nakamura' - see <http://www.iwcoffice.org/commission/members.htm> (accessed 17 February 2006) - appearing from their names possibly to be Japanese.

²²⁶⁴ 'Member Nations (83)' at <http://www.iwcoffice.org/commission/members.htm> (accessed 11 December 2008).

²²⁶⁵ Tanzania and the Democratic Republic of Congo joined early in 2008; but neither attended IWC 60.

Australia (1948); Kiribati (2004); Rep of the Marshall Islands (2006); Nauru (2005); New Zealand (1976); Rep of Palau (2002); Solomon Islands (1993); Tuvalu (2004).

16.2.3 Comment

For the first three decades of the ICRW's existence, its membership was small. It was definitely a 'niche' treaty. The treaty came eventually, however, to attain an importance that belies this original status - because of the importance of whales as an environmental symbol. At present the ICRW is in an odd position in international law - careful efforts are made to confine it, and not to allow its jurisdiction to overlap with other conservation MEAs. States are careful - think of UNCLOS and the Madrid Protocol to the Antarctic Treaty²²⁶⁶ - to keep whaling as a separate 'issue area'. This cuts both ways - as the pro-whaling bloc has been careful to retain its rights when new MEAs have been agreed; so the anti-whaling bloc has been at pains also to keep CITES from exercising any authority over cetaceans.

The 'membership race' has been a dominant feature of the ICRW for the last two decades; and whether it has been overall positive or negative is a difficult thing to assess. On one hand it may well be that the race to garner support (often from states which can have had no real interest in the matter) has contributed to much of the paralysis - the concentration on numbers has made it difficult for any states that might have liked to break the deadlock to act. When numbers are so delicately balanced, a state that tries to move into the middle risks alienating both camps. It is arguable, too, that the 'numbers race' contributed to bringing both 'bribery' and 'bullying' into the ICRW. Further, some states might have used the ICRW as a forum for political advantage, instead of contributing meaningfully to debate.

On the other hand, the argument can be made that the more that states take an interest in MEAs, and the more that all states begin to realise how interconnected are all species and ecosystems, and how these affect the lives of humans, the better. Ultimately, the bringing in of new interests, and the battle over democratic means, may help to bring greater understanding - and ultimately, perhaps, a political and legal resolution under an MEA such as the CBD.

16.2.4 Conclusion

One of the most contentious aspects of the way in which the IWC currently operates is the frantic scrabbling for support which has seen numerous states with no apparent interest in whaling adhere to the ICRW. This has then contributed to the impasse in which the states parties now find themselves. The gulf between the two camps yawns extremely wide, and this can be seen in the fights over democratic principles as well as over the utilisation of whales. This conflict has become a feature of CITES COPs also. Although many of the new parties bring their own hidden agendas, lobby groups and political niche interests; one might hope that, ultimately, the broadening of membership will contribute to resolution.

²²⁶⁶ See [Annex D.2](#) on UNCLOS; and [Annex D.6](#) on the Madrid Protocol.

17 Prospects for change

17.1 Efforts to facilitate change

17.1.1 Japan

Japan's efforts are ongoing. In August 2003 Japan's Prime Minister Junichiro Koizumi met his Czech counterpart, Vladimir Spidla, in Prague for a bilateral summit meeting toward strategic partnership. A joint statement 'confirmed that the two countries had the same view on the importance of conservation and sustainable use of natural resources, including whales'.²²⁶⁷ According to *JWA News* the Czech Republic was reportedly considering membership in the [IWC].²²⁶⁸ The Czech Republic in fact joined in 2005; but Japanese efforts appear to have been in vain as the Czech Republic appears to be firmly in the EU camp. This is hardly surprising, given the high degree of conformity required by the European Union of its members.

At IWC 53 in 2001, one of the Resolutions passed was clearly aimed at this policy of Japan's. Resolution 2001-1 (the 'Resolution on Transparency Within the International Whaling Commission') noted that the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter stipulates that: '[n]o state may use or encourage the use of economic, political, or any other type of measures to coerce another state in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind'. This noted, the Resolution went on to '[s]tress[] in particular the importance of adherence to the requirements of good faith and transparency in all activities undertaken by the IWC and in all activities by Contracting Governments in respect of their involvement with the IWC ...' The Resolution then '[e]ndorses and affirms the complete independence of sovereign countries to decide their own policies and freely participate in the IWC (and other international forums) without undue interference or coercion from other sovereign countries'.²²⁶⁹

The Resolution was introduced by New Zealand; co-sponsored by Italy, the US, the UK, Australia, the Netherlands, Mexico, Argentina, Germany and Monaco. Although principally targeted, as suggested, at Japan's alleged vote-buying; the Resolution was adopted by consensus, without being put to a vote. However, both Japan and Dominica made reservations - ostensibly on the ground that they had wanted the Resolution to cover NGOs as well as states.²²⁷⁰ That there was consensus does imply, however, that no state wished to be seen to be opposing increased transparency; arguably, a hopeful sign. Of course, states continue to hold different notions of what transparency means; particularly in respect of the secret ballot.

In September 2000, Japan announced that it would during the year add 50 Bryde's whales and 10 sperm whales (neither of which species had been hunted since 1986) to its annual catch of approximately 540 minke whales. By November 2000 Japanese whaling ships in the Antarctic

²²⁶⁷ 'Japan, Czech Republic Share Common View on Whaling' *JWA News* No. 8, December 2003

²²⁶⁸ http://www.whaling.jp/english/news/0312_02.html.

²²⁶⁹ *Ibid.*

²²⁶⁹ Resolution 2001-1, 53rd Annual Meeting of the International Whaling Commission, (see www.eelink.net/~asilwildlife).

²²⁷⁰ IWC 'Chairman's Report of the Fifty-Third Annual Meeting' (23-27 July 2001, London) in G P Donovan (ed) *IWC Annual Report of the International Whaling Commission 2001: Covering the 2000-2001 Financial Year and the 53rd Annual Meeting held in London in 2001* (2002) at 8.

and North Pacific had already taken five sperm whales.²²⁷¹ The sperm whale is, of course, the species of ‘Moby Dick’ fame and, as Severin writes, ‘[h]e is the whale which forms our popular image of his species, if not of all great whales. Chief protagonist in a classic of American literature, he is embedded in the awareness of millions of readers in the English-speaking world and, in translation, can be found on the book lists of schools and universities from Western Europe to Japan’.²²⁷² This significance is not lost on Japan. Komatsu and Misaki write that ‘[t]he sperm whale is probably the most widely known of all whale species: the legendary American novel *Moby Dick* by Herman Melville, ... immortalized this animal’.²²⁷³ Japan’s actions must be seen at least as an effort to keep the issue topical and to escalate debate at forthcoming IWC meetings and CITES Conferences; if they are not to be seen as a deliberate and calculated thumbing of its nose to the anti-whaling States.²²⁷⁴

Japan has, in addition, recently decided to allow fishermen to kill and sell whales caught by mistake in their nets.²²⁷⁵ Japan in recent times has suggested also that it will consider mariculture - the ‘farming’ of minke whales off the Japanese coastline - and that it will allow the commercial use of whales stranded on its coastline. Fish farming has its own problems and dangers.²²⁷⁶ Japan, it seems, has decided to step the pressure up in every available area.

In response to Japan’s actions, the United States has sought to prevent, or at least considered preventing - some would argue with little firm intention -, Japanese fishermen from entering American waters.²²⁷⁷ Britain has likewise banned Norwegian whale-survey ships from its waters.²²⁷⁸ US President Clinton did threaten use of the Pelly Amendment; but reaction to these (retaliatory) actions seems to have been virtually mute. In fact, very little came of these threats.

Komatsu and Misaki tell us that ‘[t]he IWC is a forum for whale management, and not a forum for trade management or market policing. In short, the purpose of the IWC is to set appropriate whaling quota (catch limits)’; and that ‘the domestic market control is the job for the national authorities’. For matters concerning international trade of whale products, they conclude, ‘these

²²⁷¹ ‘Whale story’s deadly new turn’ 13 September 2000 www.greenpeace.org/~oceans/whaling/whaleday.html.

²²⁷² T Severin *In Search of Moby Dick* (1999) at 13.

²²⁷³ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 34.

²²⁷⁴ See (n 907) and (n 2060).

²²⁷⁵ ‘For watching or eating?’ *The Economist* July 28th 2001 at 42. In response, the IWC (Resolution 2001-4, the ‘Resolution on the Incidental Capture of Cetaceans’) has expressed concern and recommended that there should be no ‘commercial exchange of incidentally-captured whales for which no catch limit has been set by the Commission’, and that should a whale caught incidentally be ‘subject to a catch limit awarded under the RMP [Revised Management Plan], and the sovereign government wish to permit commercial exchange for that whale, then: (i) A DNA sample must be forwarded to the appropriate diagnostic register; (ii) The incidental capture must be counted against the overall quota for that species or stock.’ Resolution 2001-4. 53rd Annual Meeting of the International Whaling Commission (see www.eelink.net/~asilwildlife).

²²⁷⁶ See Morton, for instance, who writes that ‘no form of land- or water-based farming uses more antibiotics per pound of livestock than salmon farming. ... The scientific literature that already existed indicated that wherever there are fish farms, wild fish are in a free fall toward extinction. ... The effects of fish farming on Norwegian rivers and wild salmon have been nothing short of devastating. In Norwegian rivers farmed salmon outnumber wild salmon by as much as four to one. Up to 4 million farmed fish escape into the wild every year, and interbreeding between escapees and wild species has been extensively documented’. A Morton *Listening to Whales: What the Orcas Have Taught Us* (2002) at 258, 282 and 303. See (n 1864).

²²⁷⁷ ‘For watching or eating?’ *The Economist* July 28th 2001 at 42. The US action was supposed to apply from September 2000; but see 8.4 generally, esp. 8.4.3.

²²⁷⁸ *Ibid.*

should be dealt with by the [CITES] and not by the IWC'.²²⁷⁹ The argument is therefore made that CITES is the appropriate body, not the country itself. This has implications. In other words, the governance of whaling should be split between the two Old Watchdogs. A problem with this argument, however, is that one might ask governance should stop at this point. It becomes arguable, as a logical extension, that the World Trade Organisation (WTO) might in fact be the appropriate body to oversee trade.

17.1.2 Norway and Iceland

Norway, however, did in 2002 resume exporting whale meat. 'Norway', according to *JWA News*, 'recently exported a total of 8 tons of minke whale meat and blubber to Iceland, which marked its resumption of [export of] whale products after 14 years of suspension. ... Norway's current inventory of whale products reportedly exceeds 1 000 tons. Its minke whale catch quota for this year has been set at 671, and so far about 550 whales have been captured by 35 small whaling fleets'.²²⁸⁰

As mentioned earlier,²²⁸¹ the very strong impression which the present writer gained from interviews conducted in Norway in 2007 is that the Norwegians feel that they offered a number of significant concessions²²⁸² in the early 1990s, that these were not accepted, and that Norway is not planning again to make such an offer. Norway is, in fact, probably glad that these concessions were not accepted. At present, the country's representatives in the whaling field believe strongly that their stance is the correct one, that they are generally a country with a carefully thought-out attitude to environmental protection, and that they have an interest in not being dictated to by countries with different interests and poorer environmental records.²²⁸³

In June 2003, Iceland announced its intention of resuming whale hunting. According to a media report, '[s]ome Icelandic marine biologists say there are now so many whales that Icelandic fish catches are threatened. An estimated 43 000 minke whales are believed to be living in Icelandic waters, eating two million tonnes of fish and krill every year'.²²⁸⁴ This argument seems commonly used by the pro-whaling bloc. The same report then suggested that Norway planned 'to hunt 100 minke whales, 100 fin whales and 50 sei whales in the next two years'.²²⁸⁵ Iceland, it seems, is currently pushing fairly aggressively - perhaps because they want to trade with Japan.

17.1.3 The United States

²²⁷⁹ M Komatsu & S Misaki *Whales and the Japanese: How we have come to live in harmony with the bounty of the sea* (2003) at 93.

²²⁸⁰ 'Norway resumes whale meat export to Iceland' *JWA News* No.2, August 2002 http://www.whaling.jp/english/news/0208_01.html.

²²⁸¹ See 3.3.34 - it was the writer's impression at IWC 59 that Norway was largely going through the motions.

²²⁸² Such as conceding to the presence of international observers on whaling vessels, with Norway paying therefor.

²²⁸³ *Personal communications* Interviews with Bjørn-Hugo Bendiksen, Reine; 26 April 2007; Turid Rodrigues Eusebio, Oslo; 23 April 2007; Rune Frøvik, Reine; 26 April 2007; Halvard Johannsen, Oslo 23 April 2007; Professor Lars Walløe, Oslo; 24 April 2007; E Couzens.

²²⁸⁴ S Hagalin 'Iceland to Resume Whale Hunting This Month' *Reuters News Article* 6 August 2003 www.asia.reuters.com.

²²⁸⁵ *Ibid.*

The Commissioner for the United States, Dr William Hogarth, currently holds the position of Chair of the IWC, and there are some hints that the US is making efforts to break the deadlock within the body. Overtly, Dr Hogarth and the Secretariat are facilitating meetings apparently with this aim,²²⁸⁶ and it is possible that there are efforts being made behind the scenes also.

17.1.4 Other countries

At various times, different countries have made efforts to break the impasse. Ireland, for instance, at one stage made a serious effort.²²⁸⁷ More recently, at the 5th Special Meeting of the IWC in October 2002, the Netherlands proposed that ‘a process be developed’ better to address ‘legal matters when raised at future meetings’; and suggested that an ‘*ad hoc* group of [five to seven] members reflecting the different views within the IWC’ might be formed. The purpose of such a group would be to prepare ways in which to deal with future legal questions. Norway, however, felt that it might be ‘preferable to let the force of deliberations run their natural course without having any prescriptive rules’. New Zealand felt that, in relation to the IWC, such an internal legal committee ‘might provide two streams of advice - a majority and a minority opinion, but that lawyers are familiar’ with such situations; and that the Netherlands’ proposal ‘would ensure that’ the IWC’s legal matters ‘would be kept internal’ but that ‘a process would be available for advising the Commission on what it might do’. The Netherlands then agreed to work with other interested parties and develop the proposal in writing.²²⁸⁸

At IWC 55 in 2003, the Netherlands reported back on its progress toward developing a process for dealing with future legal issues in the IWC. The Netherlands suggested that the IWC’s Secretariat ‘explore’ the range of legal issues that might be faced, and how other organisations deal with similar issues; and that the work, on the law of treaties, of the United Nations International Law Commission be considered. The Netherlands then suggested that there were several options which might be adopted for the future, including selecting an external legal advisor; and establishing a legal committee within the IWC. Several countries praised the work of the Netherlands; however, Denmark felt that the Commission should not ‘relinquish its decision-making powers to another body’. Norway noted that it would not recognise an external body; as it did not feel that the parties ‘have problems interpreting their obligations’. Japan argued that ‘IWC decisions should be based on the will of Contracting Governments’ and that it would not, therefore, accept external advice; and, further, that it did not believe that the work which the Netherlands proposed was currently needed.²²⁸⁹

17.1.5 The European Union

Importantly, the European Union might soon begin to flex its muscles. The EU is not itself a member of the IWC, but in June 2008 the EU announced that had agreed to speak with one voice - with a unified position - on whaling.²²⁹⁰ As the EU provides by far the largest grouping of States in the IWC, and has the economic might to back up its numbers, this is a significant

²²⁸⁶ See 3.3.25 to 3.3.34, 3.4.2, 3.4.3 and 3.4.4. See particularly (n 831).

²²⁸⁷ See (n 239), (n 442), (n 1491) and (n 1599).

²²⁸⁸ IWC ‘Voting Record at the 5th Special Meeting’ (2002) at 145-146.

²²⁸⁹ IWC ‘Chairman’s Report of the Fifty-Fifth Annual Meeting’ (16-19 June 2003, Berlin) at 40-41.

²²⁹⁰ See, for instance, ‘Press Release 2874th Council Meeting: Environment’ *Council of the European Union* 5 June 2008 http://www.eu2008.si/en/News_and_Documents/Council_Conclusions/June/0506_ENV-pr.pdf (accessed 2 December 2008).

step; although, of course, the EU Member States had largely been following the same line anyway.²²⁹¹ The future will show whether this is an important step or not. Arguably, it might, temporarily at least, derail any efforts which Japan and the US make to seek a compromise solution.

17.2 Alternatives?

17.2.1 Non-consumptive uses

Is it essential that commercial whaling be reopened; and that a commercial ivory trade be reopened? Some argue that neither is essential.

Payne writes that '[f]or those who want to harvest ivory and save elephants, it is worth noting that it is possible to harvest ivory without harvesting elephants'.²²⁹² She explains that '[l]ocal people who know the terrain, its wild animals, and the hazards of walking among them could collect the ivory from randomly aging and dying elephants'; and that '[m]ost of these people live in communal societies, which are self-regulated for honesty when the situation is such that they can communally benefit from it'.²²⁹³ Perhaps not from 'aging and dying elephants', as much as from dead ones.

Is contraception a viable possibility? It seems, on the whole, that while this is an intriguing idea it is at present fraught with too many difficulties.²²⁹⁴

Whale-watching²²⁹⁵ and tourist viewing of elephants have been cited as alternatives to consumptive use. To a large extent, these arguments have been dealt with on an ongoing basis within this thesis. It appears at the moment as if most elephant 'range states' offer a combination of the two; with Kenya and India as notable exceptions. Whale-watching, too, is combined with consumptive use in countries such as Japan and Norway. There probably is no essential reason why the two should not coexist.

²²⁹¹ With the occasional exception, of course - *vide* Denmark's voting in favour of the St Kitts Declaration at IWC 58, 2006. Whether Denmark, with the interests of the Faroes and Greenland to protect, will vote consistently with the rest of the EU member states remains to be seen. See (N 611) and (n 704).

²²⁹² K. Payne *Silent Thunder: In the Presence of Elephants* (1999) at 272-3.

²²⁹³ *Ibid* at 272-3.

²²⁹⁴ It has been reported that:

[r]ather than reducing elephant numbers by putting herds to death, conservationists such as Douw Grobler, a senior veterinarian, have been experimentally putting elephant cows "on the pill". ... Yet, even among Kruger Park's researchers, not everyone is convinced that birth control for elephants can work. For one thing, it is not cheap. To provide contraceptives for each female elephant at the Kruger would cost an estimated R1 000 a year. Then there is the fearsome cost of monitoring the elephant cows. Each would have to be darted and given a dose of PZP. All cows, having been fitted with a radio collar, would then have to be located and provided with a booster shot four weeks later. More importantly, however, some conservationists argue that the sex "solution" might be crueller in the long run than a traditional cull. Elephant mating, point out experts, is a complicated, arduous and above all, sophisticated affair, beginning with a chase in which the bull isolates the on-heat cow from the maternal herd. If contraception takes place, this is a process which will occur once every 48 months. But those cows that fail to conceive repeat the same ritual every 15 weeks. The prospect of herds of elephant cows permanently in heat, mating every four months has filled many experts with horror. Then there are the carefully structured relationships within the herd.

B Peta & J Coman 'The killing fields revisited' *Sunday Tribune* 20 March 2005 at 17.

²²⁹⁵ Martin writes of a great irony in respect of whale-watching. 'In 1962 [in Norfolk Island, Australia] whaling', he says, 'finally ceased. There were obvious concerns about the collapse of a local industry and the consequent loss of employment, but business was also concerned about the reduction in tourism that accompanied the withdrawal of the popular drama of whale butchering'. S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 156. This is ironic and, with hindsight, slightly humorous ... but it shows perhaps something of how the same ideas (and rhetoric) go around and around.

The potential economic importance of whale-watching can be seen in figures suggesting that by 2000 the whale-watching industry was worth at least US\$1-billion world-wide, with approximately 9-million people in 87 countries taking part in it.²²⁹⁶

The difficulty here is that, while there are certainly alternatives to consumptive use of both whales and elephants, it might be that none of these are currently viable replacements in and of themselves. Certainly, there would need to be a major sea change in general perceptions for these to be widely accepted.

To give one example, South Africa is a State which firmly believes in sustainable use - the country wishes officially to trade in ivory and other elephant products. On the other hand, the sustainable use to which South Africa believes whales should be put is whale-watching. This works in South Africa where, from the shore, Southern Right whales can be seen breaching.

To expect whale-watching to be popular in Northern Norway, however, where the weather might be foul and the majority species, the minke whale, does not come near shore, is fast moving and surfaces only for a few seconds, is not a realistic comparison.²²⁹⁷

17.2.2 The route to change

The landscape of the ICRW is littered with failed efforts to broker settlement; and to find alternatives. Efforts remain ongoing - although somewhat sporadic. It is important that such efforts be continued, no matter how disheartening their failures might be for the parties who make them. Change and compromise remain possible; but for these to happen quickly is probably not. Parties need to act with patience and to build the foundations for eventual accord slowly. The compromise brokered on elephants at CITES COP 14 in 2007 shows how compromise is possible. The conflict within the IWC runs deeper than within CITES, and it will take greater effort from the antagonists, but there are some signs of a possible cooling of the conflict.

²²⁹⁶ D Pauly & J MacLean *In a Perfect Ocean: The State of Fisheries in the North Atlantic Ocean* (2003) at 108.

²²⁹⁷ This point was made to me by Bjørn-Hugo Bendiksen, Head of the Norwegian Whalers' Union. *Personal communication* Interview with B H Bendiksen, Reine, Lofoten, Norway, 26 April 2007; E Couzens.

18 Special animals - links between species?

18.1 Links

18.1.1 Communication

According to D'Amato and Chopra, '[w]hales speak to other whales in a language that appears to include abstruse mathematical poetry. They have also developed interspecies communication with dolphins'.²²⁹⁸ Doubleday, describing writing by D'Amato and Chopra, comments that '[a]t the heart of the argument, is the idea that the international developments related to whale regulation have moved through a series of conceptual stages involving whales as a free resource, whales as objects of regulated hunting, whales as objects of conservation, whales as objects of protection, whales as objects of preservation, and now, because of the flowering of human consciousness, whales as *de facto* subjects of an entitlement to life'.²²⁹⁹

An early commentator, Burton, writes that '[t]he use of the voice for communication between whales has only recently received serious study' although the 'voices of whales have been known as long as their sense of hearing'.²³⁰⁰

The present writer is not entirely sure what to make of the following account offered by Lyall Watson in his *Elephantoms: Tracking the Elephant*, published in 2002; but offers it in any case:

Southern right whales are common here in the winter months, ... but this was summer and I looked again. Out beyond the breakers in deep blue water a long dark back rose gently to the surface once more and blew ... There was only one whale capable of such a spout. A blue whale, the largest animal the world has ever known. ... as I watched her, I was aware of something else, of a throbbing in the air, of what Katy Payne calls 'silent thunder'. It is a sound ... you feel rather than hear, a rumble which is more visceral than cerebral ... I rose to my feet and stared out at the whale in amazement. ... The sensation I was feeling on the clifftop was some sort of reverberation in the air itself. ... standing there in the shade of the tree was an elephant. A fully-grown African elephant, facing left, staring out to sea! ... I had never seen this elephant before, but I knew ... who she had to be. ... 'The Last Remaining Knysna Elephant'. This was the Matriarch herself. ... The throbbing was back in the air. I could feel it and I began to understand why. The blue whale was on the surface again, pointed inshore, resting, her blowhole clearly visible. The Matriarch was here for the whale! The largest animal in the ocean and the largest living land animal were no more than a hundred yards apart, and I was convinced that they were communicating. In infrasound, in concert, sharing big brains and long lives, understanding the pain of high investment in a few precious

²²⁹⁸ A D'Amato & S K Chopra 'Whales: Their Emerging Right to Life' (1991) 85 *The American Journal of International Law* 21 at 21. The problem with this well-known article is that the authors appear to set whales aside from other animals.

²²⁹⁹ N Doubleday 'Arctic Whales: Sustaining Indigenous Peoples and Conserving Arctic Resources' in M M R Freeman & U P Kreuter (eds) (1994) 241 at 255.

²³⁰⁰ R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 53. 'The Ancient Greeks', says Burton, 'knew that dolphins sometimes uttered groans and squeals and British whalers of the eighteenth century gave the beluga the name "sea canary" because they could sometimes hear it trilling like a songbird. Observations in marine aquaria show that the trills are accompanied by a stream of bubbles from the blowhole, and as whales lack vocal chords, the sounds are probably generated by air flowing past folds in the larynx'. *Ibid* at 53.

offspring, aware of the importance and the pleasure of complex sociality, these rare and lovely great ladies were commiserating over the back fence of this rocky Cape shore, woman to woman, matriarch to matriarch, almost the last of their kind.²³⁰¹

This is bizarre commentary. To the best of my knowledge, blue whales are not common off Southern Africa anyway.²³⁰² Probably the description is defensible mainly as allegory, if that is the right word - perhaps there is no single *right* word for a description by a writer who does appear to have scientific credibility but may be introducing a version of fiction's magic realism into science in order to illustrate an argument. One bit of apparent support, though, appears in a strange source which actually preceded Watson's passage - the writing of the Douglas-Hamiltons in the early 1990's, where they say of the Knysna Forest that '[s]ometimes great whales could be seen undulating through the blue waters, and on rare occasions, it was said, an elephant would emerge from its hiding-place and stand in a clear patch, facing the sea'.²³⁰³

Another snippet of support might be found in a fairly recent book by MacPherson; who writes that '[o]ne day out of Cape Town, South Africa, a pod of seven short-finned pilot whales broke the surface in rolling seas. ... They spouted and raced beside the ship in clear sight of the elephants on deck'; and '[e]xcitedly the elephants extended their trunks over the rail and called out with guttural sounds' As one of the whales, he says, 'rose up on a wave and came nearly within the reach of the elephants' trunks, Owalla let rip a trumpet blast that convinced [Randall] Moore: These two endangered species were actually *talking*'.²³⁰⁴

It is certainly an intriguing idea - communication between the two global icons of conservation. It is not unthinkable difficult to conceptualise, either - both species have shown themselves to be communicators at a level too sophisticated for easy human understanding.

18.1.2 *Elephant intelligence and sympathy*

Chadwick notes of elephants that '[a]lthough nowhere near the top of the food chain, they had become all but invulnerable through size'; and the 'resulting dominion, the release from the necessity of having to look constantly over a shoulder, in a sense freed the species to develop other aspects of its existence, such as its social relationships and intelligence'. To a far greater extent, he explains, 'than heavily preyed-upon species, elephants can set their own agenda' - '[a]t least, this is how it appears things work, from my human point of view'. He concludes that '[t]here is nothing like the African bush to help you appreciate just how much of a vulnerable animal's energy goes into staying alert'.²³⁰⁵

According to Katherine Payne, the scientist credited with the discovery that elephants communicate with infrasound, she asked herself the following questions: '[i]s this what I was feeling as I sat beside the elephant cage? Sound too low for me to hear, yet so powerful it caused the air to throb? Were the elephants calling to each other in infrasound?'. She then explains that '[e]arthquakes, volcanic eruptions, wind, thunder, and ocean storms - gigantic motions of earth, air, fire, and water - these are the main sources of infrasound, sound below the

²³⁰¹ L. Watson *Elephantoms: Tracking the Elephant* (2003) at 170-172.

²³⁰² Blue whales are, in fact, not common *anywhere* in the world.

²³⁰³ I & O Douglas-Hamilton *Battle for the Elephants* (1992) at 71-72.

²³⁰⁴ M MacPherson *The Cowboy and His Elephant: The Story of a Remarkable Friendship* (2001) at 221.

²³⁰⁵ D H Chadwick *The Fate of the Elephant* (1992) at 423.

range of human hearing, which travels huge distances through rock, water and air'; and that '[a]mong animals only the great fin and blue whales were known to make powerful infrasonic calls'. No land animal, she says, was known to approach 'the power of these great mammals of the sea, but now I wondered: might elephants, too, be using infrasound in communication?'.²³⁰⁶

According to Payne, the results of her experiments indicated that elephants hear and respond to each other's loud calls from distances as great as four km and '[a]n area of at least fifty square kilometers would be filled by such a call at a level that a listening elephant could hear'.²³⁰⁷ Payne then offers explanations for why this might be so; writing that '[l]ong-distance communication [] enables male and female elephants to find one another for mating even as they move about over large areas independently'. She explains that the fact that 'such a system has evolved is particularly striking in light of the fact that a female elephant typically spends only one period of two to five days every four or five years in estrus' - the reason for the delay being that (at least in Amboseli, where these data were gathered) a female is almost invariably fertilized during her estrous period'.²³⁰⁸

Poole, writing of the process by which researchers came to understand this aspect of elephant communication, says that '[i]f elephants were using infrasound at high sound-pressure levels, many of our interpretations of their social world would have to change'. For example, she says, 'while we defined the members of a group visually, the elephants probably used sound, and if they could communicate with one another over several kilometers, their understanding of group composition was probably quite different from ours'.²³⁰⁹

18.1.3 *Elephants and whales*

The similarities between the lifestyles of the two species would seem to offer support to shared communication characteristics. According to Payne, '[t]he social system that has evolved in elephants is oddly like that of sperm whales'.²³¹⁰ Their 'suite of characteristics', she says, 'separately evolved on land and in the sea, has produced a pair of particularly well-adapted species'.²³¹¹ Poole supports this contention; arguing that '[f]emale elephant society is complex, consisting of multitiered relationships, extending from the mother-offspring bond out through family units, bond groups, and clans'.²³¹² She backs this up by saying that '[o]ne interesting early observation that we made was that females use significantly more vocalizations than do males'.²³¹³ Whitehead lends support to the argument that sperm whales and elephants have similar social lives; explaining of sperm whales that '[w]hile on the breeding grounds, males

²³⁰⁶ K Payne *Silent Thunder: In the Presence of Elephants* (1999 (1998)) at 21.

²³⁰⁷ *Ibid* at 121-2. Meredith writes that 'African elephants possess a rich and varied vocal repertoire audible to humans. While famous for their trumpets and screams, they use a wide range of other sounds to express themselves: a purring vibration seeming to denote pleasure; a soft, moaning squeal when experiencing loneliness. When within sight of each other, they also communicate through body language, by making subtle changes in the positions of their head, ears, trunk and tail. But the most intriguing aspect of elephant communication is the part beyond human hearing. ... In all, Amboseli's researchers have identified more than fifty elephant calls, including thirty-five different rumbles, the most varied and complex part of the elephant's repertoire'. M Meredith *Africa's Elephant: A Biography* (2001) at 177-180.

²³⁰⁸ K Payne 'Sources of Social Complexity in the Three Elephant Species' in F B M de Waal & P L Tyack (eds) *Animal Social Complexity: Intelligence, Culture and Individualized Societies* (2003) 57 at 76.

²³⁰⁹ J Poole *Coming of Age with Elephants* (1996) at 117.

²³¹⁰ K Payne *Silent Thunder: In the Presence of Elephants* (1999 (1998)) at 117-119.

²³¹¹ *Ibid* at 117-119.

²³¹² J Poole *Coming of Age with Elephants* (1996) at 36-37.

²³¹³ *Ibid* at 124.

rove singly among groups of females, usually spending just a few hours with each, but sometimes revisiting a particular group several times over a period of days'.²³¹⁴

18.1.4 *Elephants and sophisticated relationships*

On increased intelligence, the reasons therefor, and female influence, Payne suggests that '[a] number of authors ... have linked social complexity to large brain size'; and some have 'correlate[d] social complexity and large brains with a slow life history, a necessary precondition for the development of both'. With the brain 'primed for social learning', she explains, 'sources of social complexity multiply during the long lifetimes of individual elephants' as '[n]ew status, new alliances, and new rivalries develop, adding to and altering existing ones as the result of hormonal changes and increasing experience'. Old females, she says, 'become repositories of ecological as well as social information, and take on different social roles from those of younger relatives'. The learning that allows for these changes, she continues, 'occurs in the context of overlapping generations whose members spend much of their time in close proximity'; with a large capacity for memory supporting 'cumulative learning, and this, together with a system for communicating over long distances, enabl[ing] elephants to exploit large, variable home ranges'. At the same time, she says, this large memory capacity 'results in a high level of behavioral variability among individuals'; and '[t]hus social complexity compounds itself in a network of temporal, spatial, and cognitive dimensions, each of which is, by virtue of its interactions with the others, flexible'.²³¹⁵

Further on possible reasons why elephants might have become particularly intelligent; Gavron tells us that according to Joyce Poole, the trunk is 'such a fantastic thing ... You can do anything with it. You can pick up a tree or a crumb, touch a friend with it, throw dust on your back, splash mud, toss a person thirty yards, carry a dead baby'; and the trunk 'has allowed the elephant to investigate the world, to bring it closer, to look at things, play with them, use them'.²³¹⁶ Poole herself writes that the trunk 'is at once a terrifically strong and yet highly tactile and sensitive appendage and is perhaps more versatile than a human hand'; and elephants use their trunks 'to eat and to drink, to mud-splash and to dust, to comfort and to reassure, to fight and to play, to smell and to communicate'.²³¹⁷ Poole then adds that '[a]n elephant's trunk and tusks are its most useful tools, and many an elephant in Kenya has learned that tusks do not conduct electricity and can be used to break electric fence wires'. 'But', she adds, 'elephants also use tools that they find in their environment'; having 'been known to intentionally throw or drop large rocks and logs on the live wires of electric fences, either breaking the wire or loosening it such that it makes contact with the earth wire, thus shorting out the fence'.²³¹⁸ Bryden gives support to this; writing that '[e]lephants seem to be able to sense when a fence has been electrified, and when this happens they are likely to use all kinds of stratagems to bypass it'.²³¹⁹

²³¹⁴ H Whitehead 'Society and Culture in the Deep and Open Ocean: The Sperm Whale and Other Cetaceans' in F B M de Waal & P L Tyack (eds) *Animal Social Complexity: Intelligence, Culture and Individualized Societies* (2003) 444 at 449.

²³¹⁵ K Payne 'Sources of Social Complexity in the Three Elephant Species' in F B M de Waal & P L Tyack (eds) *Animal Social Complexity: Intelligence, Culture and Individualized Societies* (2003) 57 at 85.

²³¹⁶ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 46.

²³¹⁷ J Poole *Coming of Age with Elephants* (1996) at 129.

²³¹⁸ *Ibid* at 132.

²³¹⁹ B Bryden *A Game Ranger Remembers* (2005) at 143.

Parker writes that ‘I saw abundant evidence that living elephants are peculiarly attracted to dead elephants’ tusks, picking up, fondling and carrying them - often for hundreds of metres’. It is difficult, he says, ‘not to be subjective about why elephants do this and why they select them in preference to a skeleton’s more abundant bones’; and, ‘[s]eemingly they have an aesthetic sense about ivory’.²³²⁰ Meredith writes that ‘[e]lephants attach a particular significance to death’ with the loss of a family member, especially a matriarch’, being ‘marked by displays and rituals which some field biologists liken to a funeral’.²³²¹ Payne offers the following description of events witnessed after the death of an elephant:

... in the Central African Republic ... 2000. On June 26, we observed and videotaped the death of a yearling elephant calf ... and (on that and the next day) 129 visits to the body by elephants of both sexes and all ages. The cause of death was probably starvation. ... On the day of death we documented 56 visits to the body by 38 individuals, including the calf’s mother and sister, who made six of the visits. On the next day we documented 73 visits by 54 individuals. The calf’s mother and sister had presumably left the area; we did not see them again ... Of the 129 visitors, 128 changed their behaviors as they approached the body. ... The nature, extent, and coupling of [] responses differed dramatically from individual to individual, as did the time spent attending the body and the number of returns to the body.²³²²

Gavron contends that ‘[a]n animal that understands death must also have some concept of life’; and ‘must have some awareness that it is alive and that it may die’.²³²³ Poole agrees; arguing that ‘[t]here is something eerie and deeply moving about the reaction of a group of elephants to the death of one of their own’; with it being ‘their silence that is most unsettling’.²³²⁴

Speaking for myself, the present writer has had two experiences of elephants doing exactly this. While working as a field guide in Zambia in 1997, I was on a vehicle which was deliberately chased away, by several older elephants, from the carcass of a young, dead elephant. The carcass had been there for several days with no sign of attention from any other elephants; yet a group of elephants had come, after having paid no obvious earlier attention to it, to surround it - apparently protectively. The second (less dramatic) experience came, in April 2006, on a walking trail in the Wilderness area of iMfolozi Game Reserve. Here I had the opportunity to see how an elephant visited the carcass of a dead elephant, spent time there, and moved the skull and several bones around the site.

The intelligence of elephants means that a number of difficult moral and ethical questions need to be considered and answered. Poole explains that she has no doubt that elephants ‘have conscious thoughts and a sense of self’. Though we may never, she says, ‘be able to collect data convincing enough for the skeptics, this subject is important not only philosophically and scientifically but also, in the context of the realities of elephant management, ethically’. If elephants, she asks, ‘are conscious, thinking animals, where do we draw the line in our management policies? Is it ethically acceptable to cull entire groups of elephants, ... Is it ethically acceptable to leave babies tied to their dead mothers as the butchering process takes place? Should elephant sport hunting be discouraged on the basis of what we know, or encouraged because it brings in revenue that can be used to ‘conserve the species’?’. Should we, she adds, ‘shoot so-called rogue or problem elephants in situations in which many of them end up being simply wounded or riddled with bullets only to die hours later?’. ‘And’, she

²³²⁰ I Parker *What I Tell You Three Times is True: Conservation, ivory, history and politics* (2004) at 77.

²³²¹ M Meredith *Africa’s Elephant: A Biography* (2001) at 183.

²³²² K Payne ‘Sources of Social Complexity in the Three Elephant Species’ in F B M de Waal & P L Tyack (eds) *Animal Social Complexity: Intelligence, Culture and Individualized Societies* (2003) 57 at 81-82.

²³²³ J Gavron *The Last Elephant: An African Quest* (1994 (1993)) at 59.

²³²⁴ J Poole *Coming of Age with Elephants* (1996) at 153.

concludes, 'if some of these practices are not acceptable, how *are* we going to deal with some of the very difficult management questions that arise?'.²³²⁵

Sheldrick contends that elephants and humans have many things in common; giving as examples 'a similar lifespan, ... and a parallel rate of development'. In the same way as humans, she says, elephants have 'a strong sense of family, and a sense of death'; showing this in actually 'bury[ing]' their dead, 'covering a body with sticks and leaves, and return periodically to pay their respects'. They 'pine and mourn', she says, 'just as we do and, of course, they remember, for the memory of an elephant surpasses even that of man'; and they 'can also display their deep feelings of compassion and sometimes this will even extend to other creatures in distress'. Sheldrick then goes even further, suggesting that elephants 'have also been endowed with many of the attributes we humans lack: telepathic powers of communication, the ability to reach across the miles through infrasound below human hearing range' - and even 'that mystical genetic memory' we call 'instinct'. Like humans, she adds, 'they also have to learn, and the wisdom of the elders is passed from one generation to the next'. Her conclusion is that 'it would be out of bounds for a human child to be sold into bondage for gain, its family first having been butchered before its very eyes'; and it 'would be cruel and inhuman to dump young children in unknown territory, leaving them to get on with their own lives as best they can without the guidance and security of adults'. Yet both, she explains, 'are common practice in elephant management - as though psychological ethics is something many wildlife authorities find more convenient to ignore', sheltering behind the 'shield' of 'good science'.²³²⁶

Meredith writes that '[t]he one factor that has moved decisively in the elephant's favour in recent years is the work of field biologists'; with their discoveries having 'revealed an ever more remarkable and complex animal'.²³²⁷ The question then must become, of course, why might this not be true for more species than just elephants and whales? Burton comments that '[t]he study of living animals has turned increasingly to answering questions about the way that they arrange their social life',²³²⁸ with social behaviour in any animal implying 'that they must communicate in some way and some form of communication is necessary to bring whales together in schools and to synchronize the behaviour of the members'.²³²⁹

Poole contends that '[t]eaching, which has been assumed to be a uniquely human attribute, is one behavior we have observed in elephants'.²³³⁰ She then explains that '[w]hen people ask what I find special about elephants, one of my answers has always been their sense of humor'. To have a sense of humor, she argues, 'one has to have not only an ability to see the funny side of a situation, to see a situation in a larger context, but also a sense of self'.²³³¹

18.1.5 Whale intelligence and sympathy

²³²⁵ *Ibid* at 158.

²³²⁶ D Sheldrick 'Foreword: The Moral Viewpoint' in D & S Balfour *African Elephants: A Celebration of Majesty* (1997) 26 at 26-27.

²³²⁷ M Meredith *Africa's Elephant: A Biography* (2001) at 225-6.

²³²⁸ R Burton *The Life and Death of Whales* (2nd ed, 1980 (1973)) at 75-6.

²³²⁹ *Ibid* at 76-8. See also: S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 37; 209.

²³³⁰ J Poole *Coming of Age with Elephants* (1996) at 139.

²³³¹ *Ibid* at 143.

In similar vein, of whales, Martin writes that '[s]inging humpback males hang balanced in the sea, or move slowly, flippers held out away from the body' and 'may sing alone for long periods'; with the song, 'which is forcefully produced', being 'heard by many humpbacks within range, and it could be attractive to females'.²³³² Some researchers, continues Martin, 'such as Jacques Cousteau, see the changing complexity of humpback whale song, and the fact that the songs are recognised and changed by other males of the stock, as evidence of a form of language'; while others 'are not as sure and are not willing to see it as anything more than a stylised display'. Whatever is the motivation for the singing, he concludes, 'it remains as a regular, identifiable and unifying thread through the humpback's migration'.²³³³

Payne, Tyack and Payne suggest that 'detailed analysis of recordings [of humpbacks] ... provides evidence that the changes in song are not simply due to forgetfulness between singing seasons'. They explain that most changes, in their research, did not occur seasonally; but instead occurred 'during the time when the whales were singing, developing their songs methodically in measurable steps'. Furthermore, they say, 'the types of change varied from season to season, and so could not be attributed to repeating seasonal factors'. They make the point that they 'know of no other animal where whole populations introduce such complex, rapid and non-reversing changes into their vocal displays, abandoning old forms and replacing them with new'.²³³⁴ The same writers then explain that it is 'inconceivable' that 'such rapid and complete turnover of the song material could reflect genetic changes'. They then refer to research by Guinee, Chu and Dorsey (1983) which apparently showed that 'the explanation is not to be found in a turnover of individuals, for the songs of individuals change just as the songs of the group do'; and that '[n]ew variations in the song must be transmitted by learning'. The progressive changes in whale song, they argue, can 'thus be seen as a form of cultural evolution, in the sense that the song is a learned trait which evolves'.²³³⁵ Payne, Tyack and Payne then explain that close examination in their research of the ways in which song themes change, seems to show that 'new forms of a theme could be introduced at any point in the singing season';²³³⁶ and that '[n]ot only is there a turnover of units or alternate phrases within each theme, but entire themes gradually die out and new ones appear'.²³³⁷ Finally, they explain that the 'peculiar characteristics of humpback whale songs and their unique attributes when compared with the songs of other animals suggest that they may demonstrate an important step along a continuum of song development from invertebrates to humans'.²³³⁸

These contentions are supported by Guinee, Chu and Dorsey; who argue that their research has shown that 'individual humpback whales change their songs over time and that the changes occurring in the songs of individuals tend to parallel the changes made in the population as a whole'. They argue that '[w]hether or not there is a stable population of singers, individuals who are singing are continuously updating their songs'; and the 'probability that whales modify their songs in the same way at the same time by chance is staggeringly small, and we must

²³³² S Martin *The Whales' Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 183-184.

²³³³ *Ibid* at 183-184.

²³³⁴ K Payne, P Tyack & R Payne 'Progressive Changes in the Songs of Humpback Whales (*Megaptera novaeangliae*): A Detailed Analysis of Two Seasons in Hawaii' in R Payne (ed) *Communication and Behavior of Whales* AAAS Selected Symposium 76 (1983) 9 at 11.

²³³⁵ *Ibid* at 10.

²³³⁶ *Ibid* at 33.

²³³⁷ *Ibid* at 35.

²³³⁸ *Ibid* at 53.

conclude once again that they listen to each other and learn the changes in the song'. Their comment on this is that it is 'most certainly, ... another clue into the mental capabilities of the species' as, '[i]n order to learn and adopt the current version of the song at all times, humpbacks must continuously be attending to a very large collection of details'.²³³⁹

Far more difficult than ascertaining that whales communicate, of course, is trying to work out what it is that they are saying *to* each other. Clark writes that in study of southern right whales the complexity of the social context was shown to be directly related to the complexity of the sounds made; with this suggesting 'not only that the whales are communicating acoustically but that they are using sounds to communicate a complex array of messages'.²³⁴⁰ Day explains that '[t]he biggest mystery of all, of course, is the mystery of [the] huge brain' of the sperm whale. How and why, he asks, 'and to what purpose has the sperm whale's brain evolved to be the largest and most complex brain ever to come into existence?'.²³⁴¹ He then states that we can 'only begin to speculate,' with the 'trick' being that we 'must allow the animal to survive long enough at least to resolve such riddles if we are to increase our knowledge of communication and non-human intelligence' - again, in his view, bringing us 'to the question of value'.²³⁴²

By way of partial explanation of whale intelligence, Whitehead argues that '[m]ost animals are both predators *and* prey'; and that '[e]ven the very large are vulnerable' with, for the sperm whale, killer whales being 'a real threat'. The structure of the oceanic habitat, argues Whitehead, 'has consequences for confronting such threats' as there 'is nowhere to hide, and the three-dimensional habitat structure makes defense against predators, and perhaps also vigilance, more difficult than on land'. In this regard, it seems that 'social structures can help, and communal vigilance for predators and communal defense against them have both been considered as important functions of the social structures of pelagic animals'.²³⁴³

As an interesting link between species, both whales and elephants have been recorded exhibiting behaviour that seems to show sympathy and concern for other species - even to the extent of 'rescuing' individuals from other species. As recently as March 2008, for instance, an incident was reported from New Zealand of a bottlenose dolphin leading two distressed whales to safety in deep water. Rescuers were attempting to persuade two pygmy sperm whales, which had repeatedly beached themselves, to leave - they were tired and apparently in deep trouble, when a resident dolphin seemingly deliberately led them to safety.²³⁴⁴

18.1.6 Sceptics

However, there are commentators who dismiss the 'special nature' of elephants and whales. Friedheim writes that not only did these species 'have to be saved from extinction' but, because

²³³⁹ L N Guinee, K Chu & E M Dorsey 'Changes Over Time in the Songs of Known Individual Humpback Whales (*Megaptera novaeangliae*)' in R Payne (ed) *Communication and Behavior of Whales* AAAS Selected Symposium 76 (1983) 59 at 78.

²³⁴⁰ C W Clark 'Acoustic Communication and Behavior of the Southern Right Whale (*Eubalaena australis*)' in R Payne (ed) *Communication and Behavior of Whales* AAAS Selected Symposium 76 (1983) 163 at 163.

²³⁴¹ D Day *The Whale War* (2nd ed, 1992) at 179-80.

²³⁴² *Ibid* at 179-80.

²³⁴³ H Whitehead 'Society and Culture in the Deep and Open Ocean: The Sperm Whale and Other Cetaceans' in F B M de Waal & P L Tyack (eds) *Animal Social Complexity: Intelligence, Culture and Individualized Societies* (2003) 444 at 448.

²³⁴⁴ See, for instance, 'NZ dolphin rescues beached whales' *BBC News* 18 March 2008; <http://news.bbc.co.uk/2/hi/asia-pacific/7291501.stm> (accessed 20 March 2008).

they were ‘special’, they had to be saved from human exploitation. Whales, along with elephants, became the ‘poster boys’ of a number of major environmental organizations; and a ‘scientific wag’, he says, characterized them as ‘charismatic megafauna’.²³⁴⁵ Friedheim then argues that a distinctive feature of the problem of managing whales - and elephants - is that many people in developed countries think of them as being ‘special creatures’ because of their size or purported intelligence ‘and therefore assert that they require a special regime not necessarily congruent with regimes for other forms of wildlife’. But, he asks, ought these species to be exempted from the normal rules developed to achieve sustainable use? The issue, he says, is important because, ‘whether just or not, a predominant decision-making role will be played by major developed states in developing and enforcing rules related to the management of the international environment’.²³⁴⁶

The differences of opinion are vast. M’Gonigle, for instance, writes that ‘[u]nlike man, their aggressively expansionist land-based counterpart, cetaceans have lived at the top of a balanced, only slowly changing cycle of life in the sea’; and, despite their dominance, have become ‘gentle and passive’ creatures. This differing character is, he suggests, ‘all the more remarkable because many now believe that cetacean intelligence, although of a profoundly different character than that of a man, is man’s rival’.²³⁴⁷

Lapointe, on the other hand, records that the sperm whale has the largest of all mammalian brains, weighing about nine kilograms (19.8 pounds); but size, he says, ‘does not equal intellect’ and whales ‘are approximately the intellectual equal of ferrets (toothed whales) or chickens (baleen whales)’. In support of this allegation of poor levels of cetacean intelligence, he offers that ‘their cerebral cortex is relatively less developed’; and that whales ‘also do not have REM or Rapid Eye Movement, which is a characteristic of most land animals’.²³⁴⁸

Broch contends that animal rights’ defenders ‘anthropomorphize the whale’ so that ‘it becomes at least as intelligent as humans and it is nurturant and has developed a sense of humour [], and is believed to want to befriend and protect humans’; so that, in a way, ‘the whale represents innocent, good, unspoiled human qualities’.²³⁴⁹ Kalland writes that ‘[i]n Lévi-Strauss’ terms, whale society has become a metaphor for the lost human paradise or utopian world and caring for whales has become a metaphor for kindness’, for being ‘good’.²³⁵⁰ He continues, writing that ‘the anti-whalers create a totemic dichotomy of mankind, with whales as the totem for themselves and with money as the totem for the whalers, a world view strongly opposed by the whalers’.²³⁵¹ Ris agrees, arguing that ‘[b]y communicating the whale as a totem, it is possible to distinguish visible and comprehensible opponents, i.e., whalers’.²³⁵²

²³⁴⁵ R L Friedheim ‘The IWC as a Contested Regime’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 3 at 5.

²³⁴⁶ *Ibid* at 25.

²³⁴⁷ R M M’Gonigle ‘The “Economizing” of Ecology: Why Big, Rare Whales Still Die’ (1980) 9:1 *Ecology Law Quarterly* 119 at 121.

²³⁴⁸ E Lapointe *Embracing the Earth’s Wild Resources: A Global Conservation Vision* (2nd ed, 2003) at 81.

²³⁴⁹ H B Broch ‘North Norwegian Whalers’ Conceptualization of Current Whale Management Conflicts’ in M M R Freeman & U P Kreuter (eds) (1994) 203 at 212.

²³⁵⁰ A Kalland ‘Whose Whale is That? Diverting the Commodity Path’ in M M R Freeman & U P Kreuter (eds) (1994) 159 at 163. See (n 1443) and (n 2350).

²³⁵¹ *Ibid* at 165.

²³⁵² M Ris ‘Conflicting Cultural Values: Whale Tourism in Northern Norway’ in M M R Freeman & U P Kreuter (eds) (1994) 219 at 224.

Stone writes that he ‘like[s] the stab Arne Kalland offers’ - that whales ‘have undergone a totemization, no less by their would-be saviors than by their aboriginal hunters’.²³⁵³ After all, Stone argues, the killing of most other animals is generally considered to be lawful if it is done ‘humanely’; and that an ‘estimated 6.5 million of the European Union’s 370 million people regularly kill wild animals for *sport* - this on top of all the mammals, from cattle to rabbits, that are raised and killed for food and medical research’. At the international level, he contends, ‘protections for nonhuman life, if any, are generally triggered only when there is evidence that a *species* is endangered’. In contrast, he says, whale hunting ‘is banned even for species that are not credibly threatened’; with the reason ‘most commonly given for the special treatment of whales (and other cetaceans)’ being their ‘reputed intelligence, which, in the face of science, has been drummed up to fabulous proportions among the credulous public’. ‘Oddly’, he concludes, ‘the killing of nonhuman primates - 200 000 monkeys were sacrificed to test the Salk vaccine alone - draws far less widespread public outcry’.²³⁵⁴

Humane methods for killing whales have long preoccupied the IWC parties. In 2004, Sweden compared figures for whales with its own data on hunting moose - more than 94 000 moose being shot annually in Sweden, and the results of a 1999 questionnaire suggesting that 75% of animals fell where they were shot and a further 11% fell nearby. Norway, however, noted that while in many countries it is ‘considered acceptable that in industrial slaughter houses instant insensibility should be achieved with one shot for 95% of animals killed’, the reality ‘can be very different’. Norway reported that for pigs the instant insensibility figure ‘can be 80%; and for bulls as low as 53%’. Referring to Sweden’s figures, Norway suggested that an animal falling where it is shot is not necessarily an indication of instantaneous death, and that its own studies had indicated a rate of 20%. Norway then explained that it ‘considered that its 80% instantaneous death rate should be regarded as a minimum’.²³⁵⁵

Ultimately, then, there is a different perspective to that of the Japanese and South African perspective, and also to the American perspective, on biodiversity - where biodiversity can be argued to require that more animals than elephants and whales be accorded respect and even rights ... but with elephants and whales being symbols of this.

Darby quotes Thoreau as asking ‘[c]an he who has discovered only some of the values of whalebone be said to have discovered the true use of the whale? Can he who slays the elephant for his ivory be said to have “seen the elephant”?’.²³⁵⁶ The answer must be a resounding no.

Martin has, in the present writer’s opinion, a well-phrased quote with which to bring this chapter appropriately toward a conclusion; writing that ‘[a]s whales continue [their] passage across our collective mind, they reaffirm a growing view of humans living in a world of shifting and fragile ecological balances, where resources are shared with a multiplicity of species. All are dependent on a secure ecological place and the effects of human change’.²³⁵⁷

²³⁵³ C D Stone ‘Summing Up: Whaling and Its Critics’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 279. See (n 1443) and (n 2350).

²³⁵⁴ *Ibid* at 279.

²³⁵⁵ ‘Chair’s Report of the 56th Annual Meeting’, 19-22 July 2004, Sorrento, Italy 44; available at <http://iwcoffice.org/meetings/chair2004.htm> (accessed 25 May 2006).

²³⁵⁶ A Darby *Harpoon: Into the heart of whaling* (2007) at 100.

²³⁵⁷ S Martin *The Whales’ Journey: A year in the life of a humpback whale, and a century in the history of whaling* (2001) at 233.

18.2 Conclusion

18.2.1 Whales and elephants

Perhaps a neat way to conclude this discussion on the common features (and shared destinies) of whales and elephants is by drawing parallels from one of the most famous ever works of literature - *Moby Dick*. Herman Melville draws comparisons several times. He refers to a particular species of whale as an 'Elephant Whale';²³⁵⁸ in what many consider to be the seminal chapter of the novel, Chapter 42: 'The Whiteness of the Whale', he draws comparisons with ancient and modern rulers elevating above all other standards that of the white elephant;²³⁵⁹ he refers to a whale rising beneath a whale boat as making 'an enormous wallowing sound as of fifty elephants stirring in their litter';²³⁶⁰ and he compares whales seen from the masthead as being reminiscent of 'recumbent elephants' on the plains of India.²³⁶¹

Melville next suggests that 'in the whale the sense of touch is concentrated in the tail'; and that 'in this respect there is a delicacy in it equalled only by the daintiness of the elephant's trunk'.²³⁶² 'Had this tail', he adds, 'any prehensile power, I should straightway bethink me of Darmonodes' elephant that so frequented the flower-market, and with low salutations presented nosegays to damsels, and then caressed their zones. On more accounts than one, a pity it is that the whale does not possess this prehensile virtue in his tail; for I have heard of yet another elephant, that when wounded in the fight, curved round his trunk and extracted the dart'.²³⁶³ He then describes the comparison of tail and trunk as being one of 'chance' and says that this 'should not tend to place those two opposite organs on an equality, much less the two creatures to which they respectively belong'; for, he says, 'as the mightiest elephant is but a terrier to Leviathan, so, compared with Leviathan's tail, his trunk is but the stalk of a lily'.²³⁶⁴

Finally, Melville suggests - perhaps somewhat unfortunately for the present writer - that '[] all comparison in the way of general bulk between the whale and the elephant is preposterous, inasmuch as in that particular the elephant stands in much the same respect to the whale that a dog does to the elephant'; but that 'there are not wanting some points of curious similitude' and gives as an example of these 'the spout'. 'It is well known', he says, 'that the elephant will often draw up water or dust in his trunk, and then elevating it, jet it forth in a stream'.²³⁶⁵

The aim of the present thesis has been to demonstrate that links and similarities between elephants and whales - and the real importance of these links - go far beyond the ability to spout water ... and that these links have the potential to influence, or perhaps even to determine, the future course of humankind's relationship with the two species - and with all other species.

It is no accident that elephants and whales have become the two most iconic species of the world's environmental movements; and - indeed - a very battleground upon which the future of the way we live with animals might be decided. Both are remarkably complicated, sensitive and

²³⁵⁸ H Melville *Moby Dick* (1994 (first published 1851)) at 149.

²³⁵⁹ *Ibid* at 189.

²³⁶⁰ *Ibid* at 224.

²³⁶¹ *Ibid* at 269.

²³⁶² *Ibid* at 361.

²³⁶³ *Ibid* at 362.

²³⁶⁴ *Ibid* at 363.

²³⁶⁵ *Ibid* at 363 - footnote.

intelligent species. We have made incredible advances in our understanding of the complexities of animal behaviour, and of the ethics of our abuse, consumption, interactions with, management, stewardship, trusteeship, and use of animals; however, we still have a long way to go.

19 Toward a conclusion

At the end of more than ten years of thinking about and writing on this subject, and more than six years of writing this thesis, concluding is no easy task.

In one sense, this thesis is very simple. It is a gathering of evidence (direct and indirect) to support the writer's contention that there are links that have gone largely unrecognised between whales and elephants, the ICRW and CITES, and to collect such evidence in writing for the first time - and thereby to make a contribution to knowledge. Of course, more is needed than mere collection if the reasons for, and the significance of, these links are to be understood.

19.1 The battle and the war

Essentially, this thesis has been an examination of the linkages between two multilateral environmental treaties; and of the linkages between two species. In order to understand the linkages it has been necessary to understand also the histories of governance of the two species, to understand their histories within both national and international law, and to understand something of the various human participants (be these nationalities, groups or individuals) who make decisions in respect of the two species, or who are affected by such decisions. This has, at times, required consideration of things that might not at once have seemed obviously relevant to international law (like local community participation in conservation in Zimbabwe)²³⁶⁶ or to the topic of the thesis (like Aboriginal Subsistence Whaling²³⁶⁷). In my view, these were necessary, however, to show how the world's understanding of management of natural resources is changing; and to show how the politics surrounding issues may overlap and influence other issue areas.

This thesis has dealt with the nature of multilateral environmental treaties; through detailed discussion of the ICRW and CITES, their histories, the ways in which they have been used and abused by their parties, and the links between them. Multilateral environmental treaties are affected by changing *mores* and *zeitgeists* - becoming ever more difficult to use effectively as the world around them changes. In the case of the ICRW, the treaty was concluded as the culmination of pre-war efforts to settle control and administration of the use of a resource - and the treaty is arguably too rigid to be appropriate for the 21st Century. Unfortunately, however,

²³⁶⁶ This is important to show, firstly, how the world generally is moving toward an understanding of the importance of the involvement of 'range people'; and, secondly, to show how the concept of 'sustainable use' is becoming more accepted.

²³⁶⁷ This is important to show how political subterfuge and the need to accommodate vested interests have influenced the history of the IWC. Although not directly relevant to the issue of the linkage between whales and elephants, the ASW issue 'punches above its weight' in that it has led directly to the current impasse in the IWC - but has also led to both division and rapprochement between Japan and the United States, and may eventually be key to a compromise that saves the IWC. Further, the ASW issue is very useful as an example of how international law is driven by diplomatic compromises, and how both people and animals may be used as bargaining chips with their best interests not considered.

its parties have become, over the years, so locked into opposed positions that it is on the one hand almost impossible to conceive of a new treaty being drafted; and, on the other, equally difficult to imagine the gap between them being bridged - as such, we limp on with an inadequate management instrument. CITES is a newer treaty, adopted in an age of different environmental sensibilities and as part of a cluster of similar treaties, and is more flexible and reflective of wider interests - but it is also beginning to show signs of tiredness and stress.

Of course, both treaties could arguably be made to work, and to work well - if their parties were *ad idem*. This requires discussion of the opposed philosophies of preservation and conservation, as these terms are used in this thesis. It may be that eventually the world's states will become reconciled in a common view of how natural resources should be protected, nurtured and used; at present, however, this is not possible - there are too many competing needs and interests. These competing wants manifest themselves in international law and politics in a tangled morass of compulsion, compromise, bullying, horsetrading, and secret deal-making. The sovereign status of statehood hangs always above - like an albatross of Damocles for those seeking to bring states together to protect the environment, for present and future generations and also for its own sake.

As Hegel puts it, the 'fundamental proposition of international law (i.e. the universal law which ought to be absolutely valid between states, as distinguished from the particular content of positive treaties) is that treaties, as the ground of obligations between states, ought to be kept'. 'But', he continues, 'since the sovereignty of a state is the principle of its relations to others, states are to that extent in a state of nature in relation to each other'. 'It follows', he then adds, 'that if states disagree and their particular wills cannot be harmonised, the matter can only be settled by war'.²³⁶⁸

The world has still not woken to the damage done to the environment by the insistence on freedom to act as one pleases on the high seas - little did the Arbitral Tribunal deciding the fate of the Bering Sea fur seals know what a destructive precedent it was setting when it ruled. Paradoxically, the world has not realised either the damage done to the environment by according states complete autonomy over natural resources within their artificially constructed borders. Little, either, did the Parties to the Paris Convention understand that one day the bearded vulture they had classified as a 'noxious' species would be considered a bird so rare that seeing one would become a special experience. There are some inklings in international law of new understandings in this regard - visible perhaps in the UNCLOS and the CBD - but it will be many years yet, and perhaps not even within the present writer's lifetime, before it is understood that neither of these extreme positions, used to justify the pillage of the oceans and the sack of environments everywhere, can be justified. The saddest thing of all, in my view, is that the damage which has thus far been done to the world's wildlife, and to its environment generally, is merely a scratching of the surface compared to what still needs to happen before people will recognise the real sacrifices they need to make - both nationally and internationally.

As at December 2008, the ICRW has 83 states parties and CITES has 173. They are significant treaties. The arguments at their meetings are incredibly bitter, and this is because so much is at stake. What I have tried to suggest in this thesis is that these two treaties - and the two iconic species over which their parties fight - have provided the battleground for one of the most

²³⁶⁸ T M Knox (trans.) *Hegel's Philosophy of Right* (1952 (1821)) at 213-214.

important battles of the human war for survival. It took the deaths of unknown millions of these two species even for them to become that battlefield - and when one thinks too of the untold (uncounted and uncountable) billions of other animal, bird and fish species which have suffered and died for or because of humanity, it is tempting to recast well known words and write that never have so few owed so much to so many.

Many states have been involved in the battles described in this thesis - and few have emerged with their standards shining. The long history of human usage of the products of the whale and the elephant has been a history of shame, hypocrisy, and self-interest. Few states have been consistent, and many have switched allegiances - sometimes temporarily and sometimes permanently.

The importance of this battle within the greater war cannot be underestimated - what happens on this battlefield will sway what happens in the end ... whether we come to realise it now, or only much later.

According to Hegel, '[i]t is as particular entities that states enter into relations with one another. Hence their relations are on the largest scale a maelstrom of external contingency and the inner particularity of passions, private interests and selfish ends, abilities and virtues, vices, force, and wrong'.²³⁶⁹ It seems to the present writer that this would be a fairly accurate description if applied to the international regimes to which whales and elephants are subject.

19.2 South Africa

This thesis has obviously had an essential sub-plot, which was to examine South Africa's views on, and role in, the debate. Obviously, there are many different views within the country - including those taking a strong preservationist line. The present government's view, however, appears clearly to be that of sustainable use of natural resources - South Africa firmly wishes to trade commercially in elephant and rhinoceros products, as with other wildlife products. On the other hand, South Africa remains firmly in the anti-whaling camp - arguing that this is not an inconsistent view, as the sustainable use to which the country wishes to see whales put happens to be non-consumptive. Whether South Africa will abide by this view on whaling in the years to come remains to be seen. Abiding will be in the face of a possible drive toward greater African unity, if other African States continue to be pro-whaling; in the face of ongoing pressure for increased linkage by pro-whaling countries; and in the face of the world apparently moving toward increased acceptance of South Africa's own sustainable use philosophy. It would also be of great interest to see where South Africa chooses to site itself, should Japan lead a walkout from the IWC - although this does not seem likely to happen, in the short term at least.

South Africa remains an important player in international environmental law. We are looked to by other countries from all sides of the debate; and we have an important contribution to make, from an informed position. It would be a tragedy if we were to forego the opportunity to make this contribution in the environmental field; as the country has in recent years so squandered its opportunities to provide leadership in the human rights context.

²³⁶⁹ *Ibid* at 215.

19.3 In my view

I began this conclusion by suggesting that this thesis has been an examination of the linkages between two treaties; and between two species. In researching these links, I found many unexpected connexions. Sitting with records in the archives at the International Whaling Commission Secretariat and discovering that, for four consecutive years in the late 1990s, Zimbabwe had attended IWC meetings and had presented written Opening Statements each time - and in each one had discussed elephants, rather than whales - was a real find. Being told that the Japanese Ambassador to South Africa had asked for support on whaling, in return for Japan's support on re-opening the ivory trade, was another such moment.

The research experience has been incredibly valuable for me. Many times over the years I have been frustrated and felt that my chosen subject is so vast that I would never be able to get a proper grip on it. However, the exhilarating feeling that I was beginning to understand the debate as I read more and more, and as I spoke to more people, and as I travelled to countries I might otherwise never have visited, has been wonderful. In particular, having the opportunity to join the South African delegation to IWC 59 in Anchorage gave me insights into the process that I would not otherwise have had. Beyond that, the friendliness that people involved in the debate - from Cape Town to Tórshavn, Nairobi to Anchorage - showed me, and their willingness to discuss the issues with me, gave me hope that it will eventually be possible for the world to accommodate different views.

I visited the Faroes in April/May 2007, in order to research the '*Grind*' - the driving of pilot whales (and occasionally other species) onto shore for slaughter. Pilot whales, being essentially dolphins, are classed as small cetaceans and are not under IWC auspices for purposes of control. I did not, unfortunately, get to see a *grind* - it being random as to when the whales might come near enough to be driven ashore; but I did get to interview a number of people involved. I was hosted by the Head of the Faroese Pilot Whalers' Association, and also interviewed various researchers and the veterinary surgeon most closely involved with improving killing methods.

To the Faroese this is an essential part of their history and culture - so that even though they are a modern society with no need for the meat as food,²³⁷⁰ they continue the practice. It is so important to them that when a pod of whales is sighted, and the alarm is given, people involved drop whatever they are doing at work and rush to the relevant spot. (There are 18 islands in total, but they are close together.) The meat is then allocated, entirely free of charge, to any people/households who want some. It is never sold. There are less than 50 000 inhabitants.

Probably about 800 to 1500 pilot whales are taken annually; from a total population that might be as high as 800 000. While unable to comment on the killing methods in practice, I was informed that it all happens remarkably quickly²³⁷¹ - the figures which I was given certainly

²³⁷⁰ Indeed, some of the whale meat taken is so imbued with heavy metals (mercury and cadmium) and polychlorinated biphenyls (PCBs) that young and pregnant women are advised not to eat it. The Faroese generally consider it safe to eat *grind* twice a month, however. The levels of chemical contamination apparently vary substantially - probably according to where the whales have been feeding. *Personal communication* Interviews with Ólavur Sjørðarberg, Leirvik, The Faroes 29 April 2007; and Dorette Bloch, Torshavn, The Faroes, 30 April 2007; E Couzens.

²³⁷¹ *Personal communication* Interviews with Ólavur Sjørðarberg, Leirvik, The Faroes, 29 April 2007; and Justinus Olsen, Torshavn, The Faroes, 1 May 2007; E Couzens.

compared very favourably to the general slaughter of animals. On a field trip to a reputable abattoir in KwaZulu-Natal, South Africa, I was informed that it is legally required that not more than six slashes be used to cut the throat of a cow - after it has been stunned with a bolt gun and hoisted into the air by a chain. However, I did see several instances where the slaughter took up to twelve slashes - and even then several cows seemed not to be dead when they were taken off further to be disembowled. While the Faroese do arguably have this one 'blind spot' in respect of cetaceans, and while they do import certain meat products, I felt that in contrast it was probably the society I have seen which treats its animals better than any other - certainly far better than my own country, South Africa. In the Faroes, farm animals generally wander unimpeded, and I was informed that there was only one building in the Faroes where cattle are kept indoors. When animals are slaughtered, it is usually done quickly and unexpectedly by someone whom the animal knows well.

At the same time as being so welcomed by people on all sides of the debate, however, the process has been terribly depressing. Some of the opposition to opposing views runs so deep that it is visceral. It will be a very long time before there is reconciliation of these views; and many animals and people are going to suffer desperately during that time.

Many times over the last few years I have been asked what I think of the subject, what my own views are. It has always been difficult to explain that I am in the process of trying to understand all views and that I have been deliberately avoiding reaching firm conclusions. For what it is worth, though, I believe that in the years ahead we are going to come to understand that animals are very much more intelligent and animal societies far, infinitely far, more complicated than we currently realise. Eventually, too, we are going to be forced to acknowledge that the damage we have done to the environment is immoral beyond belief. Whether we will learn this in time to save anything meaningful of it in its natural form is, I believe, highly unlikely.

In the meantime, while we limp toward this understanding, the best that we can strive for is to mitigate the damage we do as individuals; and we can try to persuade our representatives in the international arena to take decisions from positions that are as informed and as moral and as humane as possible.

In international management of species, until we are able to change our ways and consume less - or no - animals, we ought to manage them as best we can in as full an understanding of biodiversity, and with as precautionary an approach, as possible. While I abhor the thought of the taking of whales for human consumption, I abhor even more the careless disregard with which we consume less high profile species - such as tuna. If the taking of whales were to mean less taking of other species, so that the ecosystem in which the whales lived were to remain in a better balance than with the continued unsustainable taking, I could better accept this - until such time as we recognise that neither is truly acceptable. The cumulative damage which humankind is doing to the environment generally is probably far worse than the damage being done to any individual animal.

In international law, we can work toward increased understanding of the interconnectedness of treaties and of how the decisions we take may affect other treaties, people and species in ways that might not be immediately obvious. I have never fooled myself into believing that my writing this thesis would solve any of the problems it deals with - the differences between

viewpoints are so vast that this cannot be done except by many people in many places and with great patience. It is my hope, however, that this thesis will contribute toward the understanding of the place of two wonderful species in international law and politics, of the interconnectedness of treaties, and of the interdependent relationships between people, between animal species, and between people and animals.

In this regard, my recommendation for the future is that we recognise that in the same way that we have moved from offering protection to species in isolation to affording protection to ecosystems, so we need to understand international conventions within their 'ecosystems' - as we are coming to understand the dependance of species on each other, so we must come to understand the connexions between treaties. Even if the world moves toward increased regional management of particular ecosystems, framework conventions like the Convention on Biological Diversity must be used to bring together other disparate instruments - like the ICRW and CITES. Biodiversity depends on linkages and we need to understand the inherent biodiversity of species and the inherent biodiversity of laws - no matter how large and grey these diversities might seem to be.

20 In black and white and shades of grey: recommendations

20.1 The problem

During the writing of this thesis, I have always been careful not to delude myself into believing that my research would elucidate with finality, and provide neat solutions for, problems which international scholars and negotiators far more experienced than myself argue over and have not been able to solve. My object was, instead, to contribute to the debate by researching an area which had not been previously traversed in detail; collecting information, including the unrecorded memories and opinions of relevant actors; and then presenting the whole as a contribution to collective knowledge. In that sense, I hope that I have completed the task which I set for myself.

I will, however, conclude by making certain recommendations for the future on the basis of my research.

It has been one of the main sub-texts in this thesis that a core problem with both the ICRW and CITES is that they take a single-issue, species-specific approach. The reasons for this are to be found in the history of the development of international environmental law,²³⁷² and in the slow pace at which our scientific understanding of biological diversity has developed. How best to move away from such an approach, and to institutionalise the linkages which have developed between the ICRW and CITES (and other treaties), is the problem that needs to be solved. At stake is nothing less than adoption of the best possible philosophy to guide the future use and protection of natural resources.

It seems to me that, if it is recognised that both the ICRW and CITES have mixed records and that both are proving problematic in implementation, and that resolutions to these problems should be found, there are essentially three directions in which such resolutions might be sought. Firstly, a new convention, or conventions, might be drafted to replace or supersede the existing Conventions. Secondly, changes might be made to the existing Conventions. Thirdly, a way might be found to bring the existing Conventions in line with a new guiding philosophy.

The first seems unworkable, given the levels of mistrust, and the degrees of vested interest, which presently persist.²³⁷³ The same objection attaches to the second; although it might be easier to obtain changes than to replace wholesale. The third is probably the most viable in the present circumstances, as will be explained. This is the approach which it is suggested be adopted - that instead of trying immediately to make radical and sweeping changes warring parties begin to move closer together, to find common aims, and thereby to prepare the ground for eventual rapprochement.

²³⁷² See [2.3](#) and [2.4](#).

²³⁷³ See (n 297) and accompanying text; also (n 1526) and accompanying text.

20.2 Recommendations

20.2.1 General

As the international environmental lawyer watches international legal provisions move, with ‘catlike tread’, from ‘soft’ toward ‘hard’ law, so it is imperative that precision is required in language. This will enable terms themselves to ‘concretise’ and for the principles which they embody to become better understood. Allied to this, careful note should be taken of the way in which discourses shift over time. In this regard, for instance, attention should be given to such terms as ‘conservation’,²³⁷⁴ ‘ecosystem’,²³⁷⁵ ‘preservation’,²³⁷⁶ and ‘science-based’,²³⁷⁷ as how these are used, or abused, can have important implications for the ways in which ‘sustainable development’ is to be understood.

Probably there is not anything that can be done to create trust between states quickly - at present, the enmity runs too deep. There is considerable division in opinion even on the very nature of treaties. In respect of the ICRW, for instance, some say that it is a flexible treaty - others maintain that it is overly rigid; some describe it as outdated - others that it is remarkably prescient of modern understanding.²³⁷⁸ There are, likewise, very different views even of what constitutes democracy in international practice.²³⁷⁹

However, the sooner that a process of facilitating compromise begins, the better. In recent times, it does seem that new efforts *are* being made to facilitate trust, slowly. This is happening in both the IWC²³⁸⁰ and CITES.²³⁸¹ In particular, it is, or at least may be, in the relationship between Japan and the United States that the key to compromise is most likely to be found²³⁸² - in compromise on their polarised positions on ‘conservation’ and ‘preservation’, in their shared statuses as active whaling countries²³⁸³ and active consumers of ivory,²³⁸⁴ and in their economic power.

The real value of compromise is that if it can be reached in the contexts of whales and elephants, two species which have been so bitterly fought over, it can surely be reached in the specific contexts of other species.

²³⁷⁴ See 2.1 and 3.3.11.

²³⁷⁵ See 6.1.8.

²³⁷⁶ See 2.1.

²³⁷⁷ See 3.3.15 and 8.2 generally.

²³⁷⁸ See 3.1.3, 3.2.18, 3.2.19, 3.2.20 and 3.4 generally.

²³⁷⁹ See 16.1.5.

²³⁸⁰ See 3.4.4, (n 831) and (n 2286).

²³⁸¹ See 5.3.23 and 5.3.24.

²³⁸² See 3.3.25, 8.2.9, 14.4.1 and 17.1.

²³⁸³ Scientific permit whaling, and Aboriginal Subsistence Whaling, respectively.

²³⁸⁴ For carving purposes, and as hunting trophies, respectively.

In the building of a facilitation process, an important recognition to make is that ‘Pareto optimality’²³⁸⁵ is an obstacle to be overcome. It should be understood that while all decision-making parties may be benefitting - it is the environment itself, and certain groups of marginalised people (including future generations), who might be suffering or which will suffer in the future. What is meant by this is that while the major actors on the international stage are able to press their issues, and to benefit from the lack of change, those actors which do not have voices, or which have voices that go unheard, might not have their interests considered.

20.2.2 Implementation and enforcement provisions; and jurisdiction

It is relatively easy to make suggestions as to specific provisions that might be adopted - in the fairly sure knowledge that it is unlikely that any of them *will* be so adopted, which means that the value of the suggestions is unlikely to be tested. What I am more interested in doing is suggesting a shift in general overall approach. Nevertheless, certain specific suggestions can be made which would improve the prospects for success of such a shift occurring; and for its being successful, should it occur.

It should be made more difficult for states parties to back away from, or to sidestep, commitments they have made. It is imperative that there be improvement of enforcement provisions; and that such improvement be closely coupled to improvement in reporting obligations and monitoring techniques.²³⁸⁶ Sanctions should also be made more sophisticated - more ‘targeted’.

In respect of both of monitoring and enforcement, it is imperative that jurisdiction to engage with wildlife trade issues *within* member states should be added to CITES’ remit.²³⁸⁷ This might best be achieved, at least initially, by significantly improving linkage with the CBD.²³⁸⁸

It must be acknowledged that there are urgent problems to be dealt with; in the problems of growing undercapacity and the increasing sophistication of corruption.²³⁸⁹ If these are denied, little progress will be made.

Another possible step in respect of enhancing enforcement, although one which would need to be very carefully managed, would be to bring the World Trade Organisation (WTO) closer into the cluster of environmental treaties - in order to utilise its ‘teeth’ (its strong punitive provisions) to improve compliance.²³⁹⁰

²³⁸⁵ See 3.4.7.

²³⁸⁶ See 4.1.5, 4.2.1 and 4.2.2, in respect of CITES.

²³⁸⁷ See 4.1.6 and 4.2.2.

²³⁸⁸ Although the CBD remains ‘obesant’ (especially per Article 3: *Principle*) to the concept of state sovereignty, it takes a significant step toward breaking through the barrier imposed by this concept. Article 4: *Jurisdictional scope*, for instance, states that:

Subject to the rights of other States, and except as otherwise expressly provided in this Convention, the provisions of this Convention apply, in relation to each Contracting Party:

(a) In the case of components of biological diversity, in areas within the limits of its national jurisdiction; and
(b) In the case of processes and activities, regardless of where their effects occur, carried out under its jurisdiction or control, within the area of its national jurisdiction or beyond the limits of national jurisdiction.

See <http://www.cbd.int/convention/articles.shtml?a=cbd-04>.

²³⁸⁹ See 5.2.2, 5.3.26 and 9.3.2.

²³⁹⁰ See D.8.2.

At the same time as improving enforcement provisions, it should be recognised that a more effective system of true incentives for compliance should be introduced. The ‘carrot’ and ‘stick’ approach will not work for long unless both are real possibilities.

Of course, a hard pill to swallow is the acknowledgement that far more resources (both financial and logistic) need to be put into all of these things. Eventually, this will happen - but a ‘push’ now would be invaluable.

20.2.3 The recognition of flaws and problems

There should be recognition that all sides to the debate over sustainable use have, or at least may have, reasonable arguments to make. Almost certainly, there is value to be found within all such arguments. More importantly, however, it should be recognised that it is people and the environment which suffer from the imposition of misguided policies and from the regulatory vacuums created when states reach impasse.

It would be helpful for there to be recognition that law should evolve as understanding does. Even if a treaty *could* be made to work, were its states parties willing, the perception that it is flawed is itself damaging. Although, probably, we are not in a position to negotiate new treaties and must go on with those we have, we can arguably deal with this best by clustering them together under an umbrella - in which regard the Convention on Biological Diversity²³⁹¹ may currently provide the best sheltering cover we have. While the proliferation of regional treaties might appear to make this difficult, even this might be turned into an advantage so that habitats (both on land and at sea) can be managed with the best expertise available; while guiding principles gain clarity at a much broader level. It would be useful to recognise the value of regional expertise - and to encourage regional treaties (such as NAMMCO, ACCOBAMS and ASCOBANS in the context of cetaceans;²³⁹² and both the Lusaka Agreement²³⁹³ and the SADC Protocol on Wildlife²³⁹⁴ in the context of elephants).

It is essential to recognise, as a matter the utmost urgency, that ‘freedom of the high seas’²³⁹⁵ is a deeply, *and irreparably*, flawed concept - and that so is national sovereignty,²³⁹⁶ especially where species which have a global impact are concerned.

We desperately need a new understanding of, and attitude toward, the sea/oceans. This I see as being the greatest looming tragedy of all. We must not divorce treaties from treaties, and thereby divorce species from species - especially whales from fish. On this one, we simply cannot wait.

The Precautionary Principle²³⁹⁷ is extremely important because of the overconfidence of science - or, rather, because of the overconfidence with which political leaders appear to understand,

²³⁹¹ See 15.2 generally.

²³⁹² See 8.3 and D.1.1.

²³⁹³ See 13.2.1.

²³⁹⁴ See 13.2.2.

²³⁹⁵ See 2.1.3, 2.1.4, 11.1.3 and 11.2.1.

²³⁹⁶ See 11.1.1.

²³⁹⁷ See 11.4.

and to make use of, science. In this regard, much can be learned from history - especially from an examination of the ways in which the opinions of the Scientific Committee of the IWC have been consistently ignored.²³⁹⁸ It would be very useful to begin to include the term in important international documents - and not to mask it with the term 'Precautionary Approach'. The point which the present writer is making here is that as long as state actors are reluctant to recognise an approach as having become a principle, they show necessarily a reluctance to commit to the approach as binding on themselves. Until states do begin to make such commitments, there will always be a considerable degree of uncertainty over the degree to which environmental protection should be taken into account; and it will be easier for states to avoid making meaningful commitments to such protection. The status of the Precautionary Principle is arguably a strong bellwether to indicate the direction in which states are heading; and the fervour with which they are taking that course.

There needs to be explicit recognition of the problems caused by categorisation of species²³⁹⁹ - especially where this has been formalised in international treaties. While this recognition might well be happening slowly already, through formal and informal cooperation between different conventions, more would be helpful.

The use of reservations to provisions of international environmental treaties should be strictly limited; while it would be difficult, and perhaps even undesirable (given that their use might induce states to join a treaty which they might otherwise not join), to prevent their use altogether.²⁴⁰⁰

The roles of local communities in protecting environments must be recognised. The interests of such communities must be brought into the ecosystems of treaties which it is proposed be recognised as a form of 'biodiversity of laws'. In this respect, as examples worthy of study, the transboundary conservation area²⁴⁰¹ should be recognised as an intermediate stage between local/national and international governance; conservation programmes in Southern and Eastern Africa are particularly worth considering, if not always of emulating;²⁴⁰² and Aboriginal Subsistence Whaling²⁴⁰³ is an issue of importance beyond merely its local impacts on affected people and whale species.

Following on from this, the paradox must be recognised that in certain circumstances it might be an approach more protective of biodiversity to give private individuals greater rights over areas or species, to encourage the protection (and/or sustainable use) of these; while in other circumstances holding areas or species in public trust would serve both their interests and the interests of people (including future generations) better. This requires, of course, a delicate balancing act - but an essential one.

It must be recognised that trade has global effects, and that trade in one species in one place might have unforeseen (even unforeseeable) effects on others.

²³⁹⁸ The ironies of switched positions should be examined carefully for clues as to states' understandings.

²³⁹⁹ See 2.4.

²⁴⁰⁰ See (n 808), (n 809) and (n 811).

²⁴⁰¹ See 9.2; and also 15.3.

²⁴⁰² See 9.1 and 9.3.

²⁴⁰³ See 10.

Although obviously not definitive, the international scholar studying the sustainable use of natural resources could do worse than to draw lessons from the mistakes and innovations of the Southern African region. This region has been, and remains, such a strong focal point for conservation that it must be considered. In the same light, the experience of East Africa should be looked to and learned from. The experiences of the two regions should be compared;²⁴⁰⁴ particularly where they have managed to achieve compromise.²⁴⁰⁵

The problems created by the treatment of national sovereignty²⁴⁰⁶ as sacrosanct must be recognised; such as that this approach denies that some issues, and at least some species, must supersede national boundaries because of their global significance.

It is important also to include, in both the study of possible future courses of action and negotiation toward such possibilities, recognition of environmental challenges other than trade - the effects of climate change, habitat destruction, invasive species introduction, and pollution, for instance.

20.2.4 Toward a biodiversity of multilateral environmental agreements

There should be recognition of the inherent biodiversity of treaties, and of the fact that treating them on their own is as artificial as is treating species on their own, and of the practical importance which this recognition can have. This might be an insightful way to approach compromise, especially as it leads directly toward the CBD;²⁴⁰⁷ which, it is suggested, might provide the most appropriate battlefield on which to negotiate an armistice. Ultimately, it seems to the present writer that the CBD is the *one* current Convention, intended by its very nature to provide umbrella-style protection and in itself the product of compromise, which might provide such an opportunity for ‘rapprochement’ of views.

In respect of seeing the CBD as an ‘umbrella’ or ‘sheltering cover’ beneath which to reconcile different views, it is worth pointing out that the CBD, as can be seen from a reading of its Preamble, recognises all of the ‘intrinsic value of biological diversity’; the importance of biological diversity for ‘maintaining life sustaining systems’; a formulation of the Precautionary Principle; both *in-situ* and *ex-situ* conservation; and the dependence of indigenous and local communities on biological resources, and the value of the knowledge and culture of such group. Further recognised are the importance of ‘international, regional and global cooperation among’ states, intergovernmental organisations and non-governmental organisations; the special needs of developing countries, least developed countries and small island states; and the desirability of ‘enhanc[ing] and complement[ing] existing international arrangements for the conservation of biological diversity and sustainable use of its components’.²⁴⁰⁸

When the Russian Federation suggested,²⁴⁰⁹ at IWC 55 in 2003, that ‘whale conservation could be given high priority under the framework of the Convention on Biological Diversity’ the

²⁴⁰⁴ See 9.3.

²⁴⁰⁵ See 5.3.24, 9.3.10 and 9.3.11.

²⁴⁰⁶ See 11.1.1.

²⁴⁰⁷ See 15.2.

²⁴⁰⁸ See ‘Preamble’ at <http://www.cbd.int/convention/articles.shtml?a=cbd-00>.

²⁴⁰⁹ See (n 574) and accompanying text.

suggestion was not supported by significant numbers of states.²⁴¹⁰ It is contended that this represented a deplorably short-sighted missed opportunity; and that it should be corrected urgently.

Just as it is illogical to see whales as somehow separable from the fish species sharing their habitats, so is it illogical to see elephants as separate from the smaller species in *their* habitats. And, as illogical as are these, so is it illogical to see CITES and the CBD as separate - this must be recognised and the two brought into harmony.

In order to introduce greater linkage with the CBD, a formal step which might be taken is the introduction into the IWC and CITES of 'Joint Implementation Committees' - bodies charged with integrating the aims, the work, and the processes of the three. Such Committees could be either bilateral, perhaps initially, or trilateral.

The nettle of the whaling issue needs to be grasped²⁴¹¹ and the regulation and management of whales needs to be brought under the auspices, the guiding principles at least, of the CBD. A relatively low-key start in this regard might be a joint acknowledgement by ICRW parties that the objectives of the CBD are not incompatible with the objectives of the ICRW. The objectives²⁴¹² of the CBD are the conservation of biological diversity, which is clearly an objective also of both the ICRW and CITES; the sustainable use of biodiversity's components, which is an object that few would argue against - the fight being rather to determine what is meant by 'sustainable' and by 'use'; and the 'fair and equitable sharing of the benefits arising out of the utilisation of genetic resources', with a recognition of the importance of equity being an important step toward eventual resolution of conflict. If equity could be extended to include recognition of the rights and interests of future generations - and perhaps even eventual recognition of the rights and interests of the environment itself - significant progress would have been made.

A new approach could recognise flexibility - so that, for instance, a species abundant in one area might be traded while in another area the same species might be given strict protection. In this way, unique circumstances of trade affecting biological diversity might be taken into account.

The symbolic importance of whales and elephants needs to be recognised.²⁴¹³ This is easier said than done, in that the 'preservation' camp is presently likely to argue that the species have inherent value; and the 'conservation' camp to argue that such value has been inflated by the species having morphed into unrealistic symbols. To recognise, however, that the species may, as symbols, be representative of all other species, would be a significant step forward. Rightly or wrongly, the two species *have* become essential global symbols for different environmental philosophies, and we must make use of this - 'turn it to good'. The real point being made here is that we should recognise the statuses of both whales and elephants *as* symbols, for better or for worse, *but* at the same time we should make this recognition more sophisticated by aligning the species directly with other species and their habitats. At the same time as doing this, we

²⁴¹⁰ Consider, for instance, Mexico's immediate rejection of the idea - see (n 574).

²⁴¹¹ Consider, for instance, the exclusions of the whaling issue from UNCLOS (see D.2.3), CCAMLR (see D.5.2) and the Madrid Protocol to the Antarctic Treaty (see D.6.2).

²⁴¹² See Article 1: *Objectives* at <http://www.cbd.int/convention/articles.shtml?a=cbd-01>.

²⁴¹³ See 11.1.5.

must be careful not to understate the importance of both species as essential physical keystones within their respective ecosystems.

20.2.5 Moving from black to white

There is a multilateral environmental treaty which provides, I would like to argue, an interesting and important precedent for how the guiding philosophy, and consequently the operation, of a treaty might be transformed.

This is the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,²⁴¹⁴ also known as the London Dumping Convention (or just the ‘London Convention’ in context). In this Convention, ‘dumping’ is the ‘deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structures, as well as the deliberate disposal of these vessels or platforms themselves’. The approach which the Convention takes is to list, in Annexes, wastes which cannot be dumped and others for which a special dumping permit is required. The Convention permits dumping to be carried out under certain conditions. The severity of these conditions varies according to the danger to the environment presented by the materials themselves - but there is a ‘black list’ containing materials which may not be dumped at all.

The 1972 Convention is in the process of being replaced by a 1996 Protocol²⁴¹⁵ which makes a significant change in the way that it approaches the question of how to regulate the use of the sea as a depositary for waste materials. The 1996 Protocol, which came into force in 2006 (the 1972 Convention remains in force for those of its parties which have not adopted the 1996 Protocol), is much more restrictive than its parent Convention.

Article 4 of the 1996 Protocol states that Contracting Parties ‘shall prohibit the dumping of any wastes or other matter with the exception of those listed in Annex 1’. These listed substances are: dredged material; sewage sludge; fish waste, or material resulting from industrial fish processing operations; vessels and platforms or other man-made structures at sea; inert, inorganic geological material; organic material of natural origin; and bulky items primarily comprising iron, steel, concrete and similar non-harmful materials for which the concern is physical impact and limited to those circumstances, where such wastes are generated at locations, such as small islands with isolated communities, having no practicable access to disposal options other than dumping. In terms of 2006 Amendments to the 1996 Protocol,²⁴¹⁶ storage of carbon dioxide (CO₂) under the seabed is also allowed.

It is of huge significance to see the way in which the parties to the 1996 Protocol have moved from a ‘black list’ (certain substances being banned, all others being allowed) to a ‘white list’ (certain substances being allowed, all others being banned). This is important recognition of the damage which has been done to the world’s oceans by all of the world’s states treating them as a ‘seafill’ for centuries; and of the fact that a new approach is needed.

²⁴¹⁴ Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 1972, in force 1975, http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681.

²⁴¹⁵ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 1972, in force 2006, http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681.

²⁴¹⁶ Amendments to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, 1972, in force 2007, http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681.

The relevance of this apparent discursion is to point out that a similar shift is possible within the area of wildlife use and trade. If the IWC could be persuaded, for instance, to amend its 'Annex of Nomenclature' to include all cetaceans, except those to which special considerations apply - in other words, to move from a 'black list' of those species that cannot be taken to a 'white list' of those that can - environmental protection would be enhanced, and far greater sophistication would result. Likewise, if the parties to CITES could be persuaded to ban *all* trade in wildlife, except for those specific species in respect of which circumstances exist to make their trade environmentally acceptable, then enforcement and implementation would become far easier to control; and environmental protection would significantly be enhanced.

While these suggestions obviously represent a lofty ideal - it is suggested that there is a way to begin to move toward this scenario. This is to make far greater use than ever before of the Convention on Biological Diversity, which requires protection of habitats and ecosystems rather than of particular species.

20.2.6 Strengthening the CBD

Of course, nothing will happen overnight - as desirable as this would be. We must move in 'baby steps' and a good start would be by way of strengthening the, sadly underutilised, CBD - this would move us closer to the goal of overall protection. What is being argued for here is a subtle, but significant, shift; one which would enable the parties to foster agreement on broad principle, even where they cannot seem to reach agreement on the ground.

It should, in addition, be recognised that the CBD is concerned also with improving the welfare of humankind.²⁴¹⁷

In strengthening the CBD, the best means would probably be to increase significantly the geographical areas protected on both land and sea - this would mean a move away from the problematic categorisation approach, would be firmly in line with the proposed strengthening of the Precautionary Principle, and would aid inevitably in increasing scientific understanding of biological diversity. Protected areas must become a tool more used - both on land and at sea.

At the same time as strengthening the protection of physical biodiversity, we should recognise the value of the number of states which have become involved in the debates over use and protection of whales and elephants. Although the participation of these states has often been criticised as having been for strategic (even dishonest) purposes only, and it can be argued that their presence has only caused confusion at best, it could be an extremely positive step to recognise, in an increasingly globalised world, that all states have a role to play. All states have interests. The principles worked out, over time, in the contexts of whales and elephants, will help to protect also little-known species in little-known countries.

²⁴¹⁷ Consider, for instance, Article 1: Objectives; and Article 8: In-situ conservation, especially at (g) and (j). See <http://www.cbd.int/convention/articles.shtml?a=cbd-0>; and <http://www.cbd.int/convention/articles.shtml?a=cbd-08> respectively.

★ APPENDICES

A Summary of the text of the ICRW

A.1 *The International Convention for the Regulation of Whaling, 1946*

The subscribing governments, through their ‘duly authorised representatives’, stated in the ‘Preamble’ that they ‘recogni[se] the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’. This is both an interesting adumbration of the principle of intergenerational equity, later given prominence by the 1972 United Nations Convention on the Human Environment (the ‘Stockholm Convention’), and a recognition that it is not the whales themselves that the Treaty governs, but whales as a ‘resource’.²⁴¹⁸

There is, however, acknowledgment of the damage done to whale stocks by over-use: ‘[c]onsidering that the history of whaling has seen over-fishing of one area after another and of one species of whale after another to such a degree that it is essential to protect all species of whale from further over-fishing’. This admission is immediately undercut by utilitarian considerations: ‘[r]ecognising that the whale stocks are susceptible of natural increases if whaling is properly regulated, and that increases in the size of whale stocks will permit increases in the number of whales which may be captured without endangering these natural resources.’ This recognition, of course, gives credence to the Icelandic, Japanese and Norwegian argument that, in terms of the very Treaty itself, they should in the 21st Century be permitted to resume large-scale commercial whaling - as does the Treaty parties’ ‘[r]ecognising that it is in the common interest to achieve the optimum level of whale stocks as rapidly as possible without causing widespread economic and nutritional distress.’ Japan argues that its coastal communities are presently suffering just such ‘distress’; as does Norway, to a lesser extent.

The ‘Preamble’ reflects the parties recognising that ‘... in the course of achieving these objectives, whaling operations should be confined to those species best able to sustain exploitation in order to give an interval for recovery to certain species of whale now depleted in numbers.’ After this, it is stated that the parties ‘[d]esir[e] to establish a system of international regulation for the whale fisheries to ensure proper and effective conservation and development of whale stocks on the basis of the principles embodied in the provisions of the International Agreement for the Regulation of Whaling, signed in London on 8th June, 1937, and the protocol to that Agreement signed in London on 24th June, 1938, and 26th November, 1945; and [h]av[e] decided to conclude a convention to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry.’²⁴¹⁹

Article I:

According to Article I, the Convention includes the attached Schedule and applies to all waters where whaling is prosecuted by factory ships, land stations and whale catchers under the jurisdiction of a contracting party.

²⁴¹⁸ International Convention for the Regulation of Whaling, signed at Washington, 2 December 1946, and its Protocol, signed at Washington, 19 November 1956. See <http://www.iwcoffice.org/Convention.htm>.

²⁴¹⁹ *Ibid.*

Article II:

Contains definitions of ‘factory ship’, ‘land station’, ‘whale catcher’ and ‘contracting government’.

Article III:

Under this Article the International Whaling Commission (IWC) is established. Each member (one from each contracting government) is to have one vote. The Commission is left to establish its own rules of procedure, except that a 75% majority is required ‘for action in pursuance of Article V’.

The contracting governments were directed, in recognition of potential duplication of functions with other fishery-related United Nations-linked agencies, to consult amongst themselves within two years of the Convention coming into effect and to decide whether the Commission should be brought within the framework of a specialised agency. Clearly, this did not happen, but it is interesting to note that the issue of duplication of functions has been recognised from the beginning.

The Article directs that meetings of the Commission subsequent to the first meeting ‘shall be convened as the Commission may determine’. There is a meeting held at least annually.

Article IV:

According to Article IV, the Commission may independently, or in collaboration with independent agencies of the contracting governments or other agencies (public or private) or establishments or organisations, encourage (recommend or even organise) studies and investigations relating to whales and whaling. The Commission is empowered also to collect and analyse statistical information concerning whale stock conditions and the effects thereon of whaling; and also to appraise and disseminate information as to methods for maintaining and increasing the populations of whale stocks. The Commission is to arrange for the publication of reports of its activities and to publish ‘such reports as it deems appropriate, as well as statistical, scientific, and other pertinent information relating to whales and whaling’ - either independently or in collaboration with the International Bureau for Whaling Statistics at Sandefjord in Norway.

Article V:

In V:1, the Commission is empowered to amend the provisions of the Schedule through adopting regulations with respect to conserving and utilising whale resources, by fixing: ‘(a) protected and unprotected species; (b) open and closed seasons; (c) open and closed waters, including the designation of sanctuary areas; (d) size limits for each species; (e) time, methods, and intensity of whaling (including the maximum catch of whales to be taken in any one season); (f) types and specifications of gear and apparatus and appliances which may be used; (g) methods of measurement; and (h) catch returns and other statistical and biological records’.²⁴²⁰ These are the ‘usual suspects’ of management regimes.

In V:2, it is stated that the amendments to the Schedule in terms of V:1 ‘(a) shall be such as are necessary to carry out the objectives and purposes of this Convention and to provide for the conservation, development, and optimum utilisation of the whale resources; (b) shall be based on scientific findings; (c) shall not involve restrictions on the number or nationality of factory ships or land stations, nor allocate specific quotas to any factory or ship or land stations; and (d) shall take into consideration the interests of the consumers of whale products and the whaling industry’.²⁴²¹

²⁴²⁰ *Ibid* Article V:1. (a)-(g).

²⁴²¹ *Ibid* Article V:2 (a)-(d).

V:3 deals with time limits applicable to objections made by Contracting Governments to amendments to the Schedule, giving other parties time to consider objections made and to change their own stances accordingly. The important point to note is that where an objection has been made, and the relevant time period has expired, the amendment will be binding only on those Contracting Governments which have not objected - and this position will persist until the objection is withdrawn.²⁴²²

Article VI:

This is a somewhat trite Article which holds that the Commission ‘may from time to time make recommendations to any or all Contracting Governments on any matters which relate to whales or whaling and to the objectives and purposes of this Convention’.

Article VII:

This Article is interesting in that it imposes a duty (‘shall’) on each Contracting Government to ‘ensure prompt transmission to the International Bureau for Whaling Statistics at Sandefjord in Norway, or to such other body as the Commission may designate, of notifications and statistical and other information required by this Convention in such form and manner as may be prescribed by the Commission’.

Article VIII:

This is the Article that deals with the exemption for scientific research which Japan has exploited since the imposition of the 1982 moratorium on commercial whaling. VIII:1 provides that ‘[n]otwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorising that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention. Each Contracting Government shall report at once to the Commission all such authorisations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted’.²⁴²³

Damage control is attempted. VIII:2 provides that ‘[a]ny whales taken under these special permits shall so far as practicable be processed and the proceeds shall be dealt with in accordance with directions issued by the Government by which the permit was granted’.²⁴²⁴ This arguably means that the Japanese stance of distributing whales caught for scientific research purposes to commercial restaurants is correct in terms of the Convention.

Perhaps to ensure, if possible, that genuine scientific research is conducted, VIII:3 provides that ‘[e]ach Contracting Government shall transmit ... in so far as practicable, and at intervals of not more than one year, scientific information available to that Government with respect to whales and whaling, including the results of research conducted pursuant to paragraph 1 of this Article and to Article IV’.²⁴²⁵ CITES has a similar provision, which is observed more in the breach.

Article VIII concludes with acknowledgment of the fact that the Convention was never originally envisaged as a ‘preservationist’ instrument and that its parties did not wish to be inhibited in their whaling efforts. ‘Recognising that continuous collection and analysis of

²⁴²² *Ibid* Article V:3 (a)-(c).

²⁴²³ *Ibid* Article VIII:1.

²⁴²⁴ *Ibid* Article VIII:2.

²⁴²⁵ *Ibid* Article VIII:3.

biological data in connection with the operations of factory ships and land stations are indispensable to sound and constructive management of the whale fisheries, the Contracting Governments will take all practicable measures to obtain such data'.²⁴²⁶ This can perhaps be seen as an attempt to gain something from the continued factory harvesting of whales - it being inevitable that this harvesting should continue.

Article IX

IX:1 provides that '[e]ach Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction'.²⁴²⁷

IX:2 is somewhat dated today, nodding to the employment practices of the owners of whaling fleets at the time of the Treaty. It provides that '[n]o bonus or other remuneration calculated with relation to the results of their work shall be paid to the gunners and crews of whale catchers in respect of any whales the taking of which is forbidden by this Convention'.²⁴²⁸

IX:3 is an interesting subparagraph - in relation to the Law of the Sea Convention. It is provided that '[p]rosecution for infractions against or contraventions of this Convention shall be instituted by the Government having jurisdiction over the offence'.²⁴²⁹ This appears to have fallen into disuse at least (if not suspended).

IX:4 is related to the jurisdiction issue in IX:3 and provides that: '[e]ach Contracting Government shall transmit to the Commission full details of each infraction of the provisions of this Convention by persons or vessels under the jurisdiction of that Government as reported by its inspectors. This information shall include a statement of measures taken for dealing with the infraction and of penalties imposed'.²⁴³⁰

Article X

X:1 ensured that the signatories to the initial convention were not bound merely by their signatures, by providing that '[the] Convention shall be ratified and the instruments of ratification shall be deposited with the Government of the United States of America'.²⁴³¹

X:2 was to become of great significance in the future, as it provided that '[a]ny Government which has not signed this Convention may adhere thereto after it enters into force by a notification in writing to the Government of the United States of America'.²⁴³² The importance of the wording lies in the fact that there is no qualification as to what states may join. This was later to enable landlocked states such as Mongolia to ratify the Treaty and become members with status equal to that of the conventional whaling powers. Important.

X:3 is merely a formal requirement - that on receipt of deposited ratifications and received adherences, the Government of the United States of America inform all other signatory Governments and all adhering Governments.²⁴³³ X:4 is also formal, but does show, perhaps, which nations were the driving forces behind the Treaty and the most important actors at the time. The section provides that the Convention will come into force when at least six signatory

²⁴²⁶ *Ibid* Article VIII:4.

²⁴²⁷ *Ibid* Article IX:1.

²⁴²⁸ *Ibid* Article IX:2.

²⁴²⁹ *Ibid* Article IX:3.

²⁴³⁰ *Ibid* Article IX:4.

²⁴³¹ *Ibid* Article X:1.

²⁴³² *Ibid* Article X:2.

²⁴³³ *Ibid* Article X:3.

Governments have deposited instruments of ratification, these six including at least the five of The Netherlands, Norway, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. The Convention becomes binding on a Government when it ratifies or adheres, and becomes binding on the date of deposit of its instrument of ratification, or on the date or receipt of its notification of adherence.²⁴³⁴ X:5 is formal, also, providing simply that the Schedule to the Treaty will not operate retrospectively: '[t]he provisions of the Schedule shall not apply prior to 1st July, 1948. Amendments to the Schedule adopted pursuant to Article V shall not apply prior to 1st July, 1949'.²⁴³⁵

Article XI

This article provides for the withdrawal of Governments from the Convention. Put simply, a Contracting Government may withdraw simply by giving six months' notice before 1st January of any year - withdrawal then being effective after 30th June of the same year.²⁴³⁶

The original signatories to the Treaty were: Chile, Peru, Argentina, Denmark, the Union of Soviet Socialist Republics, Australia, France, the United Kingdom of Great Britain and Northern Ireland, Brazil, the Netherlands, the United States of America, Canada, New Zealand, and the Union of South Africa.²⁴³⁷ Norway joined these in 1948.

In 1956, the Contracting Governments (the fourteen mentioned above) signed a Protocol to the Convention. Article I of the Protocol provided that the definition of "whale catcher" in subparagraph 3 of Article II be amended to provide that '... "whale catcher" means a helicopter, or other aircraft, or a ship, used for the purpose of hunting, taking, killing, towing, holding on to, or scouting for whales'.²⁴³⁸ Clearly this was a response to technological innovations in the field of whaling.

Also amended was paragraph I of Article V, the change being that 'methods of inspection' were added to the list of activities concerning which the Commission was empowered from time to time to adopt regulations.²⁴³⁹

²⁴³⁴ *Ibid* Article X:4.

²⁴³⁵ *Ibid* Article X:5.

²⁴³⁶ *Ibid* Article XI.

²⁴³⁷ *Ibid* Signatories.

²⁴³⁸ Article I of the Protocol to the International Convention for the Regulation of Whaling Signed at Washington under date of December 2, 1946. Dated 19 November 1956, Washington, USA.

²⁴³⁹ *Ibid* Article II.

A.2 Section 10(e) of the Schedule to the Convention

Section 10 of the Schedule is titled 'Classification of Stocks' and its best known section is s10(e) which reads as follows:

[n]otwithstanding the other provisions of paragraph 10, catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whale stocks and consider modification of this provision and the establishment of other catch limits.

B Summary of the text of CITES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973. (Washington DC.) Entered into force 1 July 1975. Amended at Bonn, 22 June 1979.

According to the Preamble, the Contracting States recognise that ‘wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come’ - the intergenerational equity idea is present, from the Stockholm Conference of 1972. The States are ‘conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view’ ... ‘recogni[se] that people and States are and should be the best protectors of their own wild fauna and flora’ - paying homage to sovereignty, as usual. The States ‘recogni[se], in addition, that international cooperation is essential for the protection of certain species of wild fauna and flora against overexploitation through international trade’ ... and are ‘convinced of the urgency of taking appropriate measures to this end’.²⁴⁴⁰

Article I: Definitions

The definitions section is not extensive, containing only eight definitions. Within these definitions, ‘(a) “Species” means ‘any species, subspecies, or geographically separate population thereof’. ‘(b) “Specimen” means: (i) any animal or plant, whether alive or dead’; (ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix III, any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; ...’ ‘... (c) “Trade” means export, re-export, import and introduction from the sea’; ... ‘(d) “Re-export” means export of any specimen that has previously been imported’; ... ‘(e) “Introduction from the sea” means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State’; ...’ A ‘Scientific Authority’ and a ‘Management Authority’ mean such national authorities as designated in accordance with Article IX. A ‘Party’ means a State for which the present Convention has entered into force.

Article II: Fundamental Principles

What this Article does is create the three Appendices into which listed species are placed, or categorised, and thereby afforded different degrees of protection against overexploitation by trade. Article I.1: Appendix I species include all species threatened with extinction which are or may be affected by trade. Trade in these specimens ‘must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances’. Article I.2: Appendix II includes ‘(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and (b) other species which must be subject to regulation in order that trade in specimens of certain species (as referred to in (a)) may be brought under effective control’.

²⁴⁴⁰ Preamble to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973. Entered into force 1 July 1975. Amended at Bonn, 22 June 1979. See United Nations Environment Programme *Selected Texts of Legal Instruments In International Environmental Law* Nairobi: United Nations Environment Programme, 2005 121-171. It can be seen that the Convention is ostensibly a protectionist treaty - and quite firmly rooted in the discourse of the early seventies. However, the implicit recognition that trade is a reality (and ‘here to stay’) leads one to the inevitable conclusion that the treaty is also a trade treaty - a ‘regulation of trade’ treaty.

Article I.3: Appendix III includes ‘all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other Parties in the control of trade.’ Article I.4 then regulates Articles I.1, I.2 and I.3 by providing that ‘the Parties shall not allow trade in specimens of species included in all three Appendices, except in accordance with the provisions of [CITES]’. This is the idea of categorisation of species.

Article III: Regulation of Trade in Specimens of Species Included in Appendix I

This Article governs all trade in specimens of species included in Appendix I. (III.1) The Article provides that ‘[t]he export of a species included in Appendix I shall require the prior grant and presentation of an export permit’. (III.2) There are four conditions for the granting of such an export permit: that (a) ‘a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species’ ... (b) that ‘Management Authority of the State of export is satisfied that’ the laws of that State for the protection of fauna and flora have not been contravened by the obtaining of the specimen; ... (c) that a Management Authority of such State ‘is satisfied that’ the ‘risk of injury, damage to health or cruel treatment’ will be minimized in respect of the preparation and shipping of any living specimen; ... and (d) that a Management Authority of the State of export ‘is satisfied that an import permit has been granted for the specimen’.

The Article continues, providing that (III.3) the ‘import of any [Appendix I] specimen ... shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate’. There are three conditions (requirements) for the granting of an import permit: that (a) ‘a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved’; ... that (b) a ‘Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it’; ... and that (c) a ‘Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes’.

The Article continues, providing that (III.4) the ‘re-export of any specimen of a[n Appendix I] species shall require the prior grant and presentation of a re-export certificate’. There are three conditions for the granting of such a permit: that (a) a ‘Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of [CITES]’; ... that (b) that ‘Authority’ be ‘satisfied that the ‘risk of injury, damage to health or cruel treatment’ will be minimized in respect of the preparation and shipping of any living specimen’; ... and (c) that a Management Authority of the State of export ‘is satisfied that an import permit has been granted for the specimen’. In other words, the requirements for re-export are substantially similar to those for export, with the exception of the requirement that a Scientific Authority of the exporting State does not need to advise that the [re-]export will not be detrimental to the survival of the species in question.

The Article continues, providing that (III.5) the ‘introduction from the sea of any specimen of a[n Appendix I] species shall require the prior grant of a certificate from a Management Authority of the State of introduction’. There are three conditions prerequisite for the granting of such a certificate: that (a) a ‘Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved’; ... that (b) a ‘Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it’; ... and that (c) a ‘Management

Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes’.

Article IV: Regulation of Trade in Specimens of Species Included in Appendix II

The Article governs trade in specimens of species in Appendix II, which trade must be in accordance with the provisions of this Article. (IV.1)

The Article provides that export of any Appendix II species requires prior grant and presentation of an export permit; which permit shall only be granted on the following conditions: that (a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the species’ survival; that (b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of that State’s laws for the protection of fauna and flora; and that (c) a Management Authority of the State of export is satisfied that preparation and shipping of any living specimen will minimize the risk of injury, damage to health or cruel treatment. (IV.2)

Export permits granted for Appx II species, and the actual exports of such specimens, shall be monitored by a Scientific Authority in each Party. Where such an Authority determines that export of specimens of any such species should be limited to maintain that species throughout its range (at a level consistent with its role in the ecosystems in which it occurs, and well above the level at which it might become eligible for inclusion on Appx I) the Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the granting of export permits. (IV.3)

The import of any specimen of an Appx II species shall require the prior presentation of either an export permit or a re-export certificate. (IV.4)

The re-export of any specimen of any Appx II species shall require the prior grant and presentation of a re-export certificate, which certificate shall be granted only where (a) a Management Authority of the State of re-export is satisfied the specimen was imported into that State in accordance with the provisions of [CITES]; and (b) that Authority is satisfied that any living specimen will be prepared/shipped so as to minimize the risk of injury, damage to health or cruel treatment. (IV.5)

The introduction from the sea of any Appx II species specimen shall require the prior grant of a certificate from a Management Authority of the State of introduction, which certificate shall be granted only where (a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species; and (b) a Management Authority of the State of introduction is satisfied that any living specimen will be prepared/shipped so as to minimize the risk of injury, damage to health or cruel treatment. (IV.6)

Certificates referred to in this Article may be granted on the advice of a Scientific Authority, in consultation with other national (or, when appropriate, international) scientific authorities, for periods not exceeding one year for total numbers of specimens to be introduced in such periods. (IV.7)

Article V: Regulation of Trade in Specimens of Species Included in Appendix III

The Article governs trade in specimens of species in Appendix III, which trade must be in accordance with the provisions of this Article. (V.1)

The Article provides that export of any Appendix III species requires prior grant and presentation of an export permit; which permit shall only be granted on the following conditions: that (a) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of that State's laws for the protection of fauna and flora; and that (b) a Management Authority of the State of export is satisfied that preparation and shipping of any living specimen will minimize the risk of injury, damage to health or cruel treatment. (V.2)

Unless Article V.4 applies, the import of any specimen of an Appendix III species shall require the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit. (V.3) In the case of re-export, a certificate granted by the Management Authority of the State of re-export (that the specimen was processed in that State or is being re-exported) shall be accepted by the State of import as evidence that the provisions of [CITES] have been complied with iro the specimen. (V.4)

Article VI: Permits and Certificates

Permits and certificates granted under Articles III, IV and V shall be in accordance with the provisions of this Article. (VI.1) An export permit shall contain the information specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted. (VI.2) Each permit/certificate shall contain the title of [CITES], the name and any identifying stamp of the granting Management Authority and a control number assigned by the Management Authority; (VI.3) and any copies shall be clearly marked as copies, and not used in place of the original except to the extent endorsed thereon. (VI.4) For each consignment of specimens, a separate permit or certificate shall be required. (VI.5) The export permit or re-export certificate (and any corresponding import permit) shall be cancelled and retained by a Management Authority of the State of import. (VI.6) A Management Authority may, where appropriate/feasible, affix a mark (meaning an indelible imprint, lead seal or other suitable means, designed in such a way as to render its unauthorized imitation as difficult as possible) upon any specimen to assist in identification. (VI.7) Of Ian Parker and his marker pen in Burundi.

Article VII: Exemptions and Other Special Provisions Relating to Trade

The provisions of Articles III, IV and V shall not apply to transit/transshipment of specimens through or in the territory of a Party while the specimens remain in Customs control; (VII.1) nor shall they apply where a Management Authority of the State of export is satisfied (and issues a certificate to that effect) that a specimen was acquired before the provisions of [CITES] applied to that specimen. (VII.2) Nor shall the provisions apply to specimens that are personal or household effects; but this exemption shall not apply where (a) iro Appx I specimens, they were acquired by the owner outside his State of usual residence, and are being imported into that State; or (b) in the case of Appx II specimens, they were (i) acquired by the owner outside his state of usual residence and in a State where removal from the wild occurred; (ii) they are being imported into the owner's State of usual residence; and (iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens; unless a Management Authority is satisfied the specimens were acquired before the provisions of [CITES] applied to such specimens. (VII.3)

Specimens of Appendix I animal species (bred in captivity for commercial purposes) or of a plant species (artificially propagated for commercial purposes) shall be deemed to be specimens of Appx II species. (VII.4) Where a Management Authority of the State of export is

satisfied that any specimen of an animal species was bred in captivity, or any specimen of a plant species was artificially propagated, (or is a part of such an animal or plant or was derived therefrom) a certificate to that effect by that Management Authority shall be accepted in lieu of any of the permits or certificates required under Articles III, IV or V. (VII.5)

Articles III, IV and V shall not apply to the non-commercial loan, donation or exchange between scientists or scientific institutions registered by a Management Authority of their State, or herbarium specimens, other preserved, dried or embedded museum specimens, and live plant material which carry a label issued or approved by a Management Authority. (VII.6)

Articles III, IV and V may be waived by a Management Authority of any State to allow movement without permits/certificates of specimens which form part of a travelling zoo, circus, menagerie, plant exhibition or other travelling exhibition, provided that (a) the exporter/importer registers full details of such specimens with that Management Authority; (b) the specimens are in either of the categories in paras 2 or 5 of the present Article (VII); and (c) the Management Authority is satisfied that any living specimen will be transported/cared for so as to minimize the risk of injury, damage to health or cruel treatment.

Article VIII: Measures to Be Taken by the Parties

The Parties shall take appropriate measures to enforce the provisions of [CITES] and to prohibit trade in specimens in violation thereof; such measures shall include (a) penalizing trade in, or possession of, such specimens, or both, and (b) providing for the confiscation (or return to the State of export) of such specimens. (VIII.1) In addition to such measures, a Party may (when it deems it necessary) provide for any method of internal reimbursement for expenses incurred as result of confiscation of a specimen taken in application of the provisions of [CITES]. (VIII.2)

Parties shall ensure, as far as possible, that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit/entry at which specimens must be presented for clearance. The Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment. (VIII.3)

Where a living specimen is confiscated (its measures as per VIII.1) the specimen (a) shall be entrusted to a Management Authority of the State of confiscation; (b) the Management Authority shall, after consultation with the State of export, return the specimen to that State at the expense of that State, or to a rescue centre or such other place as the Management Authority deems appropriate and consistent with the purposes of the present Convention; and (c) the Management Authority may obtain the advice of a Scientific Authority, or may (whenever it considers it desirable), consult the Secretariat in order to facilitate the decision under (b), including the choice of a rescue centre or other place. A 'rescue centre' means an institution designated by a Management Authority to look after the welfare of living specimens, particularly those confiscated. (VIII.5)

Each party shall maintain records of trade in Appx I, II and III species, which records shall cover (a) the names/addresses of exporters/importers; and (b) the number and type of permits/certificates granted, States with which such trade occurred, numbers or quantities and types of specimens, names of species as included in Appx's and, where applicable, the size and sex of specimens. (VIII.6) Each Party shall prepare periodic reports on its implementation of [CITES] and shall transmit to the Secretariat (a) an annual report containing a summary of the info in VIII.6(b); and a biennial report on legislative, regulatory and administrative measures

taken to enforce the provisions of [CITES]. (VIII.7) The info referred to in VIII.7 shall be available to the public (where this is not inconsistent with the law of the Party). (VIII.8)

Article IX: Management and Scientific Authorities

Each Party shall designate for the purposes of [CITES] one or more (a) Management Authorities competent to grant permits or certificates on behalf of that Party; and (b) one or more Scientific Authorities. (IX.1) A State depositing an instrument of ratification, acceptance, approval or accession shall at that time inform the Depositary Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat; (IX.2) and any changes to the 'status' of such, shall be communicated by the Party to the Secretariat for transmission to all other Parties. (IX.3) Any (such) Management Authority shall, if so requested by the Secretariat or by the Management Authority of another Party, communicate to it impressions of stamps, seals or other devices used to authenticate permits/certificates.

Article X: Trade with States not Party to the Convention

Where export/re-export/import is to/from a State not a Party to [CITES], comparable documentation issued by the competent authorities in that State which conforms substantially with the requirements of [CITES] for permits/certificates may be accepted in lieu thereof by any Party.

Article XI: Conference of the Parties

[After the first COP] the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the Parties. (XI.2) At (regular or extraordinary) meetings the Parties shall review the implementation of [CITES] and may (a) make such provision as may be necessary to enable the Secretariat to carry out its duties, and adopt financial provisions; (b) consider/adopt amendments to Appx's I/II (in accordance with Article XV); (c) review the progress made towards the restoration and conservation of the species included in Appx's I, II, III; (d) receive and consider any reports presented by the Secretariat or by any Party; and (e) make recommendations for improving the effectiveness of [CITES]. (XI.3)

At each regular meeting, the Parties may determine the time and venue of the next regular meeting. (XI.4) At any meeting, the Parties may determine and adopt rules of procedure for the meeting. (XI.5)

The United Nations, its Specialized Agencies and the International Atomic Energy Agency, as well as any State not a Party, may be represented at meetings by observers, who shall have the right to participate but not to vote. (XI.6)

Any body/agency technically qualified in protection/conservation/management of wild fauna/flora, which has informed the Secretariat of its desire to be represented by observers at meetings, shall be admitted unless at least one-third of Parties present object, if (a) such body/agency is an international agency or body, either governmental or non-governmental, or a national governmental agency or body; or (b) is a national non-governmental agency or body which has been approved for this purpose by the State in which it is located. Once admitted, these observers shall have the right to participate, but not to vote. (XI.7)

Article XII: The Secretariat

A Secretariat shall be provided by the Executive Director of UNEP. To the extent and in the manner he considers appropriate, he may be assisted by suitable inter-governmental or non-governmental international or national agencies/bodies technically qualified in protection/conservation/management of wild fauna and flora. (XII.1)

The Secretariat's functions shall be (s) to arrange for/service meetings of the Parties; (b) to perform the functions entrusted to it under Arts XV and XVI; (c) to undertake scientific and technical studies in accordance with programmes authorized by the [COP] as will contribute to the implementation of [CITES], including studies concerning standards for appropriate preparation/shipment of living specimens and the means of identifying specimens; (d) to study Parties' reports and to request from Parties such further info with respect thereto as it deems necessary to ensure implementation of [CITES]; (e) to invite the attention of the Parties to any matter pertaining to the aims of [CITES]; (f) to publish periodically and distribute to the Parties current editions of Appx's I, II, III together with any info which will facilitate identification of specimens of included species; (g) to prepare annual reports to the Parties on its work and on the implementation of [CITES] and such other reports as [COPs] may request; (h) to make recommendations for the implementation of the aims and provisions of [CITES], including the exchange of information of a scientific or technical nature; (i) to perform any other function as may be entrusted to it by the Parties.

Article XIII: International Measures

When the Secretariat (in the light of information received) is satisfied that any Appx I or II species is being affected adversely by trade in specimens of that species or that the provisions of [CITES] are not being effectively implemented, it shall communicate such information to the authorized Management Authority of the Party/ies concerned. (XIII.1) When any Party receives such a communication, it shall, as soon as possible, inform the Secretariat of any relevant facts insofar as its laws permit and, where appropriate, propose remedial action. Where the Party considers that an inquiry is desirable, such inquiry may be carried out by one or more persons expressly authorized by the Party. (XIII.2) Such information provided, or inquiry report, shall be reviewed by the next [COP] which may make whatever recommendations it deems appropriate. (XIII.3)

Article XIV: Effect on Domestic Legislation and International Conventions

The provisions of [CITES] shall in no way affect the right of Parties to adopt (a) stricter domestic measures [United States/European Union] regarding the conditions for trade, taking, possession or transport of specimens of Appx I, II, III species, or the complete prohibition thereof; or (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appx I, II or III. (XIV.1) The provisions of [CITES] shall in no way affect the provisions of any domestic measures (or the obligations of parties deriving from any treaty, convention or international agreement) relating to other aspects of trade, taking, possession or transport of specimens which is in force for any Party including any measure pertaining to the fields of Customs, public health, veterinary or plant quarantine ... (XIV.2) The provisions of [CITES] shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external Customs control and removing Customs control between the

parties thereto, insofar as they relate to trade among the States members of that union or agreement. (XIV.3)

A State party to [CITES], which is also party to any other treaty, convention or international agreement which is in force at the time of the coming into force of [CITES] and under the provisions of which protection is afforded to Appendix II marine species, shall be relieved of the obligations imposed on it under [CITES] with respect to trade in specimens of Appendix II species that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement. (XIV.4)

Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with [XIV.4] shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement. (XIV.5)

Nothing in [CITES] shall prejudice the codification and development of the law of the sea by the [UNCLOS convened pursuant to Res 2750C (XXV) of the GA of the UN] nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction. (XIV.6)

Article XV: Amendments to Appendices I and II

In relation to amendments to Appendix I and II, at meetings of the [COP], the following provisions apply: (a) any party may propose an amendment to Appendix I or II for consideration at the next meeting, the text of which proposed amendment shall be communicated to the Secretariat at least 150 days before such meeting. The Secretariat shall consult the other Parties and interested bodies on the amendment in accordance with [XV.2(b) and (c)] and shall communicate the response to all Parties not later than 30 days before the meeting. ... (b) Amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes 'Parties present and voting' means Parties present and casting an affirmative or negative vote - Parties abstaining shall not be counted among the two-thirds necessary. ... (c) Amendments adopted at a meeting shall enter into force 90 days after that meeting for all Parties except those which make a reservation in accordance with [XV.3]. (XV.1)

In relation to amendments to Appendix I and II, between meetings of the [COP], the following provisions apply: (a) any Party may propose an amendment to Appendix I or II for consideration between meetings by the postal procedures [in XV.2]; ... (b) for marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring co-ordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible. ... (c) for species other than marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties, and, as soon as possible thereafter, its own recommendations. [These provisions imply that the Secretariat is to take an active role.] ... (d) any Party may, within 60 days of the date the Secretariat communicated its (b) or (c) recommendations, transmit to the Secretariat any comments on the proposed amendment, together with any relevant scientific data or information. ... (e) the Secretariat shall communicate the replies received together with its own recommendations to the Parties as soon as possible. ... (f) if no objection is received within 30 days of the date of communication under

(e), the proposed amendment shall enter into force 90 days later for all Parties (except those which make a reservation in accordance with XV.3). ... (g) if an objection by any Party is received by the Secretariat, the proposed amendment shall be submitted to a postal vote [in accordance with XV.2(h), (i) and (j)]. ... (h) the Secretariat shall notify the Parties that notification of objection has been received. (i) unless the Secretariat receives the votes for, against or in abstention from, from at least one-half of the Parties within 60 days of the notification in (h), the proposed amendment shall be referred to the next meeting of the [COP] for further consideration. (j) provided that votes are received from one-half of the Parties, the amendment shall be adopted by a two-thirds majority of Parties casting an affirmative vote. (k) the Secretariat shall notify all Parties of the result of the vote. (l) if the proposed amendment is adopted, it shall enter into force 90 days after the date of notification by the Secretariat of its acceptance for all Parties except those which make a [XV.3] reservation. (XV.2)

During the period of 90 days provided for by XV.1(c) or XV.2(l), any party may by notification in writing to the Depositary Government make a reservation with respect to the amendment. Until such reservation is withdrawn, the Party shall be treated as a State not a Party to [CITES] with respect to trade in the species concerned. (XV.3)

Article XVI: Appendix III and Amendments thereto

At any time, any Party may submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in [II.3]. Appendix III shall include the names of the Parties submitting the species for inclusion therein, the scientific names of the species so submitted, and any parts or derivatives of the animals or plants concerned that are specified in relation to the species for the purposes of [I(b)]. (XV.1) Each list submitted under XVI.1 shall be communicated to the Parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. At any time after the communication of such list, any Party may (by notification in writing to the Depositary Government) enter a reservation with respect to any species or any parts or derivatives, and until such reservation is withdrawn, the State shall be treated as a State not a Party to [CITES] with respect to trade in the species or part or derivative concerned. (XVI.2)

A Party which has submitted a species for inclusion in Appendix III may withdraw it at any time (by notification to the Secretariat, which shall communicate the withdrawal to all Parties). The withdrawal shall take effect 30 days after the date of such communication. (XVI.3) Any Party submitting a list under the provisions of [XVI.1] shall submit to the Secretariat a copy of all domestic laws and regulations applicable to the protection of such species, together with any interpretations which the Party may deem appropriate or the Secretariat may request. The Party shall, for as long as the species is included in Appendix III, submit any amendments/interpretations of such as they are adopted. (XVI.4)

Article XVII: Amendment of the Convention

On the written request of at least one-third of the Parties, the Secretariat shall convene an extraordinary meeting of the [COP] to consider and adopt amendments to [CITES]. Such amendments shall be adopted by a two-thirds majority present and voting, which (for these purposes) means Parties present and casting an affirmative or negative vote (abstentions not being counted among the two-thirds required). (XVII.1) The Secretariat shall communicate to all Parties, at least 90 days before the meeting, the text of any proposed amendment. (XVII.2) For the Parties which have accepted it, an amendment shall enter into force 60 days after two-

thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depositary Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment. (XVII.3)

Article XVIII: Resolution of Disputes

Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute. (XVIII.1) If the dispute cannot be resolved [as per XVIII.1], the Parties may, by mutual consent, submit the vote to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision. (XVIII.2)

Article XIX: Signature

The present Convention shall be open for signature at Washington until 30th April 1973 and thereafter at Berne until 31st December 1974.

Article XX: Ratification, Acceptance, Approval

[CITES] shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Government of the Swiss Confederation, which shall be the Depositary Government.

Article XXI: Accession

[CITES] shall be open indefinitely for accession. Instruments of accession shall be deposited with the Depositary Government.

Article XXII: Entry into Force

[CITES] shall enter into force 90 days after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, with the Depositary Government. (XXII.1) For each State which ratifies, accepts or approves [CITES] or accedes thereto after the deposit of the tenth instrument of ..., [CITES] shall enter into force 90 days after the deposit by such State of its instrument of ...

Article XXIII: Reservations

The provisions of [CITES] shall not be subject to general reservations. Specific reservations may be entered into in accordance with the provisions of XXIII and XV and XVI. (XXIII.1) Any State may, on depositing its instrument of ..., enter a specific reservation with regard to (a) any Appx I, II or III species; or (b) any parts or derivatives specified in relation to an Appx III species. (XXIII.2) Until a Party withdraws its reservation entered under the provisions of XXIII, it shall be treated as a State not a Party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation. (XXIII.3)

Article XXIV: Denunciation

Any Party may denounce [CITES] by written notification to the Depositary Government at any time. The denunciation shall take effect twelve months after the Depositary Government has received the notification.

Article XXV: Depositary

The original ... in Chinese, English, French, Russian and Spanish ... each version being equally authentic ... (XXV.1) ... the Depositary Government shall inform all signatory and acceding States and the Secretariat of signatures, deposit of instruments of ..., entry into force ..., amendments thereto, entry and withdrawal of reservations and notifications of denunciation. (XXV.2) On entry into force, a certified copy ... to the United Nations ... (XXV.3)

In witness whereof, the undersigned Plenipotentiaries, being duly authorized to that effect, have signed [CITES] ... at Washington ... 3 March 1973 ...

APPENDIX C The re-adherence of Iceland

C.1 IWC 53, 2001

At IWC 53 in 2001, Iceland sought to rejoin the IWC. However, what caused controversy is that Iceland sought to rejoin with its instrument of adherence being made expressly conditional on a reservation to the commercial whaling moratorium, as found in paragraph 10(e) of the Schedule to the ICRW.²⁴⁴¹ Iceland explained that it had withdrawn in 1992 because it had believed that the IWC ‘was no longer operating in accordance with the Convention and had become a non-whaling commission rather than a whaling commission’. Iceland, however, now felt that there were signs within the IWC of support increasing for sustainable whaling; and that Iceland had, therefore, rejoined in order to ‘have an influence on the discussions taking place’. Iceland claimed that it had the right under international law to adhere with a reservation.²⁴⁴²

Australia opposed Iceland’s rejoining with a reservation; arguing that it was the IWC which would have to decide whether this was acceptable or not. The US supported this, pointing out that Iceland had had the opportunity to lodge a reservation in 1982, while a member, but had not done so; and that ‘acceptance of this reservation now would undermine the commercial whaling moratorium’.²⁴⁴³ Japan argued against the Australian position; suggesting that ‘acceptance or not of the reservation is a decision for each Contracting Government’.²⁴⁴⁴ The Netherlands, UK, Italy, Argentina, New Zealand, Monaco, Sweden, Spain, Germany, Ireland and Finland expressed views similar to those of Australia. New Zealand argued that the Convention does not provide for reservations; and that ‘the reservation to the Convention requires the acceptance of the competent organ, and that therefore the Commission can and must decide’. Antigua and Barbuda, Norway, the Rep of Guinea, Iceland, the Russian Federation, Grenada and St Lucia spoke in support of Iceland; arguing that Iceland ‘was within its rights’ to adhere with a reservation, and that the Commission ‘did not have competency’ to refuse it.²⁴⁴⁵ Switzerland, interestingly, argued that the IWC is not an international organisation ‘as it does not qualify as an autonomous body that possesses an independent legal personality’; and that a vote on the present issue would itself be against international law. France argued that it would object to Iceland’s reservation; but that it did not believe that the Commission was entitled to vote on the issue. Denmark considered the issue to be so complicated that it should not be decided at this stage; and that a vote should not be taken. The Chair then ruled, in the absence of any clear view, that the Commission did indeed have the competence to determine the status of Iceland’s proposed adherence with a reservation.

The vote (on whether the Chair’s ruling should be upheld or not) saw 19 votes in favour, 18 against, and one abstention (Austria). Iceland ‘regretted’ the vote and explained that it considered it to be an ‘illegal vote’. The Chair then proceeded to the substantive motion (the Australian/US motion that Iceland’s adherence with a reservation not be accepted); however, all of Japan, Antigua and Barbuda, Iceland, the Rep of China, the Rep of Guinea, Norway, Morocco, Grenada, St Kitts and Nevis, St Lucia, the Solomon Islands, St Vincent and the Grenadines, Panama and Dominica indicated that they would not take part, as they considered the vote to be ‘illegal’. The motion, put to the vote, received 19 votes in favour and none against; with 3 abstentions and 16 countries not participating.²⁴⁴⁶ The Chair then ruled that Iceland would, thenceforth, be ‘invited to assist as an observer’. This was contentious too, with Japan opposing the ruling; put to the vote, it was carried with 18 for, 16 against, and 3

²⁴⁴¹ IWC ‘Chairman’s Report of the Fifty-Third Annual Meeting’ (23-27 July 2001, London) at 5. See [Annex A.2](#).

²⁴⁴² *Ibid* at 5.

²⁴⁴³ *Ibid* at 6.

²⁴⁴⁴ *Ibid* at 6.

²⁴⁴⁵ *Ibid* at 7.

²⁴⁴⁶ *Ibid* at 7-8.

abstentions. Iceland, however, ‘indicated its intention to continue to participate in the meeting as a Contracting Government’.²⁴⁴⁷

In its written Opening Statement, Iceland itself argued that the ‘Convention itself grants Contracting Governments the right not to be bound by this paragraph [10(e) of the Schedule] by way of objecting to it as Iceland has done with its reservation. How can something, which is allowed in the Convention be incompatible with the object and purpose of that very same Convention? The answer is simple: it can not’. Iceland then argued that ‘[i]nternational relations are based on the rule of law’ and that ‘Iceland can not believe that any country present at this 53rd annual meeting of the IWC will actually sidestep this principle in favour of political objectives. If this happens, States are allowing politics to override the rule of law. This would not only undermine the credibility of the IWC but also that of international relations in general’.²⁴⁴⁸

In its written Opening Statement, Antigua and Barbuda argued that ‘[t]o have a vote by the [IWC] on the reservation made by Iceland is an absurdity, which this organisation would not easily live down. It would confirm the suspicions in the minds of many: that the IWC is an organisation that tramples on the sovereign rights of member countries in rampant pursuit of the extremist agenda of special interests’.²⁴⁴⁹ Along the same lines, the Solomon Islands, in its written Opening Statement, said that it had ‘watched over the years with great disbelief, the path troddened (*sic*) by the IWC, ignoring its purpose and mandate, which is to ensure conservation of whale species and the orderly development of whaling, but instead is being steered towards the total conservation of whales, despite the fact that certain stocks are well over their sustainable levels’.²⁴⁵⁰ Morocco, in its written Opening Statement, said that ‘[i]n conformity with relevant international conventions on marine living resources exploitation, Morocco complies with actions targeting conservation, and sustainable development which are not prejudicial to its natural sustainability’. Morocco then explained that ‘[t]his vision is the fundamental basis of the Moroccan strategy in the fisheries sector development as well as a major concern of Moroccan authorities within international organisations and fora dealing with fisheries’.²⁴⁵¹ In its written Opening Statement, as an Observer, Namibia said that its position ‘is based on Article 95(1) of the Namibian Constitution: “and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future” ...’. Namibia suggested that it would ‘support every effort geared towards conservation which is based on the best scientific advice. Namibia, can however not support conservation just for the sake of conservation. Where the best scientific advice indicates that a resource can be harvested sustainably, harvesting must be allowed’.²⁴⁵²

In its written Opening Statement, South Africa explained that its Constitution provides for ‘ecologically sustainable development and use’ of natural resources; and that South Africa, ‘in accordance with international practice’, interpreted ‘sustainable use to incorporate both the concepts of “consumptive” and “non-consumptive” use’. South Africa then explained that its tourism market benefited significantly from whale watching; and that it views ‘whale sanctuaries as a natural progression towards collective and sustainable management with a joint custodian role for ourselves’ and advised that it would ‘continue to support them’.²⁴⁵³

²⁴⁴⁷ *Ibid* at 8.

²⁴⁴⁸ IWC ‘Opening Statements of the Fifty-Third Annual Meeting’ (23-27 July 2001, London); written Opening Statement by: Iceland (IWC/53/OS/ICE). Iceland then suggested, further, that it ‘left the IWC nine years ago because of broken promises. The deadline to revise the zero quota, or the so-called moratorium, was being ignored by the Contracting Governments opposed to whaling. As this revision has not been conducted Iceland believes it is necessary to press the issue’. *Ibid*

²⁴⁴⁹ *Ibid*; written Opening Statement by: Antigua and Barbuda (IWC/53/45).

²⁴⁵⁰ *Ibid*; written Opening Statement by: Solomon Islands (IWC/53/OS/SOL).

²⁴⁵¹ *Ibid*; written Opening Statement by: Morocco (IWC/53/OS/MOR).

²⁴⁵² *Ibid*; written Opening Statement by: Namibia (IWC/53/OS/NAM). Namibia participated as an Observer.

²⁴⁵³ *Ibid*; written Opening Statement by: South Africa (IWC/53/OS/SOU).

C.2 IWC 54, 2002

At IWC 54 Iceland again deposited an instrument of adherence - with a reservation. Iceland stated that it now regarded itself as a member of the IWC, despite the events and the Chair's ruling of the previous year. Antigua and Barbuda noted that it had considered that the Commission has no authority to deny Antigua and Barbuda from accepting Iceland as a new member; 'or to interfere with treaty relations between States'.²⁴⁵⁴ Denmark, after being undecided the previous year, gave its view that the IWC is not competent to decide on this issue; which Denmark felt should be a 'bilateral matter between Iceland and those individual Contracting Governments having problems with Iceland's reservation'. The Rep of Guinea, China, Grenada, the Rep of Palau and St Kitts and Nevis stated that they recognised Iceland as a member; as did Norway, St Lucia, Japan and the Russian Federation. The US, however, gave its view that Iceland 'want[ed] to be the sole judge of whether to exercise its reservation in the future'; and argued that if Iceland does not like the commercial whaling moratorium, 'then it should join the IWC without reservation and work towards having the moratorium lifted'. New Zealand and the UK argued along similar lines; as did Italy, Mexico, Australia, Ireland, Spain and Germany.²⁴⁵⁵ Antigua and Barbuda argued, however, that the 'treaty relations which exist among IWC members are not between the individual Contracting Governments and the Commission but between the individual Contracting Governments themselves'; and that each Party had the right to object, in which case the reservation would have no effect as between those Parties, or the right to accept the reservation. The country argued further that there was 'adequate precedent regarding reservations' and that, in the past, they had been addressed by individual Contracting Governments instead of by the Commission. On the issue of previous reservations, Japan pointed out that Argentina and Ecuador had, at their adherences, made reservations relating to territorial waters; and noted that the IWC had not, then, intervened with respect to these reservations as it was now doing with Iceland.²⁴⁵⁶

The Chair then repeated his ruling of 2001, and invited Iceland to participate as an Observer; at which point Japan and Norway challenged the ruling, and also the competence and authority of the Chair to make such a ruling. A vote on the Chair's ruling was then held; but the challenge was not successful, with 20 votes for and 25 against, and the Chair's ruling was upheld. On the Chair's competence then being put to the vote; there were 17 votes in support of the challenge, 24 against and three abstentions. Iceland then withdrew; after making a statement explaining that it 'considered all attempts not to recognise it as a member' to be 'illegal, therefore not affecting its status as a member'. According to Iceland, there had been breaches of the general principles of international law, of the ICRW, and of the IWC's Rules of Procedure; it argued specifically also that the US (as depositary government) had misused its position in 'not notifying Iceland as a member' of the ICRW, that the Chair had acted contrary to the ICRW, and that a majority of members had 'violated general principles of international law' and the ICRW.²⁴⁵⁷

In Opening Statements at IWC 54, Gabon explained that it had decided to adhere 'in view of the interest among its tourists created by the presence of cetaceans in Gabonese waters'; and that it believed in preserving biodiversity and the environment' at international level, 'especially the marine environment, and in fighting against illegal fishing activities'.²⁴⁵⁸ Mongolia explained that it wished to 'assure the right of landlocked countries to access and use international water resources, as established by [UNCLOS]'; and 'to support the principle of sustainable use of renewable water resources'. Mongolia then referred to its 'many thousand-year tradition of using natural resources sustainably'; and that it considers it 'right to use renewable resources in a sustainable way'.²⁴⁵⁹ The Republic of Palau

²⁴⁵⁴ IWC 'Chairman's Report of the Fifty-Fourth Annual Meeting' (20-24 May 2002, Shimonoseki) at 5-6.

²⁴⁵⁵ *Ibid* at 6.

²⁴⁵⁶ *Ibid* at 6-7.

²⁴⁵⁷ *Ibid* at 7.

²⁴⁵⁸ *Ibid* at 7.

²⁴⁵⁹ *Ibid* at 7.

stated its ‘commitment to the principle of sustainable management and the rational utilisation of the world’s marine resources’; and suggested that it is ‘important that members take account of the best scientific information’. Palau ended with an appeal for technical and other support for it to be able to build capacity and participate effectively in the Commission’s work.²⁴⁶⁰ Portugal referred to the oceans as ‘a common heritage of mankind that it believed should be preserved for future generations’ which needed to be preserved.²⁴⁶¹ San Marino explained that, although a landlocked country, it had a long-standing interest in ‘preservation of natural resources worldwide’; and mentioned in particular that it considered ‘the creation of sanctuaries’ to be ‘an effective way of protecting some whale species from extinction’.²⁴⁶²

C.3 The 5th Special Meeting of the IWC, 2002

The 5th Special intersessional Meeting was held on 14 October 2002, in Cambridge. The Meeting was held at the request of the US and the Russian Federation, in order to repeat their request for a Schedule amendment to allow for the granting of an aboriginal subsistence take of bowhead whales from the Bering-Chukchi-Beaufort Seas stock. Again, there was controversy over Iceland which had, on 10 October, deposited an instrument of adherence with the US (as depositary government). Again, the reservation to the moratorium was an integral part of the instrument; however, Iceland had made a concession by committing not to authorise whaling ‘for commercial purposes by Icelandic vessels before 2006’. The Chair decided that, as in previous years, it should first be decided whether or not the Commission has the competence to decide the issue; before, secondly, deciding whether or not to allow adherence with a reservation.²⁴⁶³

After much debate, and several votes, Antigua and Barbuda challenged the Chair’s ruling that, as decided at IWC 53 and IWC 54, firstly, the IWC has the competence to decide the legal status of Iceland’s reservation; secondly, that the Commission does not accept Iceland’s reservation; and, thirdly, that Iceland is invited to assist as an observer. On being put to a vote, the challenge to the Chair’s ruling was upheld; with 19 votes for, and 18 against. In reaction, Ireland noted that ‘the Commission had voted to accept Iceland as a member with its reservation’. Brazil indicated that it ‘considered it incorrect to allow Iceland to vote in a vote that was basically upholding previous decisions’; and that ‘it considered that the outcome of the vote had been seriously undermined since Iceland was voting in its own interest’. Norway, however, advised that it ‘considered this normal’. Mexico described Iceland’s voting on the Chair’s ruling as ‘illegal’; but stated that it would abide by the decision. Australia explained that it objected, and would register its objection formally, to Iceland’s reservation; and to Iceland being allowed to vote on the matter. New Zealand advised that it considered that the decision had ‘opened up a procedure that would enable countries once bound by a treaty to leave the organisation then to return making reservations to whatever they find objectionable’. New Zealand explained that it was gravely concerned not only for the IWC’s integrity; but for all multilateral environmental agreements. Countries such as Australia, Mexico, New Zealand, Italy, the UK, the Netherlands and France indicated that they would object formally to Iceland’s reservation; countries such as Monaco and the US indicated that they would object bilaterally.²⁴⁶⁴

According to Gillespie, what had happened was that the Chair had eventually suggested that the issue was this time, as compared to IWC 53 and 54, different; and that the reservation was a different one. What made the difference in the end, he suggests, was that Sweden decided that it was indeed a new reservation and, thereby, swung the balance of power away from those who wanted to keep Iceland out

²⁴⁶⁰ *Ibid* at 7-8.

²⁴⁶¹ *Ibid* at 8.

²⁴⁶² *Ibid* at 8.

²⁴⁶³ IWC ‘Chairman’s Report of the 5th Special Meeting’ (14 October 2002, Cambridge) at 139-140.

²⁴⁶⁴ *Ibid* at 140-142.

for as long as Iceland insisted on joining with the reservation.²⁴⁶⁵ This ‘subtle change’, he says, meant that after a 19 to 18 vote that it was a new reservation, a number of countries conceded the battle and agreed to recognise Iceland’s membership on Iceland’s terms - however reluctantly.²⁴⁶⁶ One irony of this was that it was Sweden’s Commissioner, Professor Bo Fernholm, who was the Chair.

It would not be correct of course to ‘blame’ Sweden entirely for allowing Iceland in.²⁴⁶⁷ It seems that, in a confused and confusing set of circumstances, there are other contenders for ‘blame’. South Africa’s position is somewhat odd here. South Africa decided not to send its official Commissioner, or an Alternate Commissioner, to Cambridge; but to send a representative from its diplomatic staff in London, with instructions to vote against Iceland’s rejoining with a reservation. However, the representative did not arrive for the Meeting.²⁴⁶⁸ On such vagaries, important international consequences might turn; as happened in this case.

C.4 IWC 55, 2003

Italy, Mexico and New Zealand made statements in which they declared that they considered either that Iceland’s reservation, in terms of paragraph 10(e) of the Schedule, was invalid; or that they did not recognise Iceland as a party entitled to participate in the IWC.²⁴⁶⁹

C.5 Conclusion

Working out exactly what happened in 2001 and 2002 is not easy, and the description in this Annex shows how complicated voting procedures can be. Also, working out what might have happened behind the scenes is even more difficult. In an interview with Eusebio and Johansen, in Norway, it was suggested to me that the price of the US’s having won back its ASW quota for bowhead whales was its support for Iceland’s re-adherence with a reservation to the moratorium.²⁴⁷⁰ According to the *Chairman’s Report*, the US in its role as depositary government tried to steer a neutral course and give no opinion on the status of Iceland’s membership.²⁴⁷¹ According, however, to the Briefing available on the IWC’s website, the US was won of those countries²⁴⁷² which subsequent to the Meeting formally objected to Iceland’s reservation by notifying the US, as depositary government.²⁴⁷³ I felt, therefore, that it was worth including this short section on Iceland’s adherence, in an Annex, as it provides a neat example of how opaque the crafting of international law can be.

²⁴⁶⁵ A Gillespie ‘Iceland’s Reservation at the International Whaling Commission’ (2003) 14:5 *EJIL* 977 at 978.

²⁴⁶⁶ *Ibid* at 978.

²⁴⁶⁷ Another way to see what happened is that the final, and deciding, vote was cast by the Chair - who happened to be from Sweden.

²⁴⁶⁸ *Personal communication* from Herman Oosthuizen, Anchorage, Alaska, May 2007; E Couzens. Personally, I do not find it terribly surprising ... and I surmise that the representative might simply not have found the offices, the ‘Red House’ (which isn’t red) in Impington, a small village some five miles outside Cambridge, of the IWC - which are unobtrusive and not easy to locate, being barely recognisable as such even when one is standing outside of them. The only signs are a small brass plate on the front door and, if the blinds are open, a large inflatable plastic whale hanging above the desk of one of the administrative staff members.

²⁴⁶⁹ *Ibid* at 6.

²⁴⁷⁰ *Personal communications* Interview with Turid Rodrigues Eusebio and Halvard Johannsen, Oslo 23 April 2007; E Couzens.

²⁴⁷¹ IWC ‘Chairman’s Report of the 5th Special Meeting’ (14 October 2002, Cambridge) at 139.

²⁴⁷² Argentina, Australia, Brazil, Chile, Finland, France, Germany, Monaco, Netherlands, Peru, Portugal, San Marino, Spain, Sweden, UK and the US.

²⁴⁷³ ‘Iceland and her re-adherence to the Convention after leaving in 1992’ *IWCOffice.org*
http://www.iwcoffice.org/_documents/_iceland.htm.

APPENDIX D Relationships between MEAs

D.1 The IWC, CITES and other organisations

D.1.1 Relationships

Asked about the relationship between the IWC and other Conventions, or international instruments, Donovan said that the IWC is not a trade organisation, which means that in general it would not have a relationship with organisation such as the WTO. Even on both sides of the debate, he suggested, the views concern conservation (in the sense of preservation) and management (in the sense of sustainable use). Put to him by the present writer that the charge might be made that the IWC is, in fact, stifling trade; he agreed that the charge *could* be made, but felt that the IWC's role was to set catch limits, not to regulate trade.²⁴⁷⁴ He said too that, despite various memoranda of understanding with other organisations, the IWC's relationships with other organisations took place 'mainly at the scientific level' - particularly with organisations like ASCOBANS.²⁴⁷⁵

D.2 The Law of the Sea Convention

D.2.1 The global commons

Vogler describes the oceans as having been 'the original global commons, fished and navigated for millenia'. He explains that there was a systematic attempt made to draw up principles for the use of the oceans; this being evident 'even at the beginning of the seventeenth century' with the classic doctrine of the freedom of the seas (*mare liberum*) being devised by the Dutch scholar Grotius. He then explains that a dramatic demonstration of the vulnerability of the commons 'was provided by the collapse of great whale stocks in the interwar period'; and that the 'response was the creation, in the first half of the twentieth century, of a number of regional common property resource (CPR) regimes known as fisheries commissions' which, '[i]n their attempt to manage stocks', abridged the absolute freedoms that had characterised the old high seas regime.²⁴⁷⁶

Birnie suggests that Grotius' objective had in fact been 'to establish that the Dutch had the right to sail freely to the East Indies'; and that he had therefore been concerned with 'rights over the open sea, not coastal waters' and that his first strategy was, consequently, 'to prove that no single state could establish a title to the waters concerned'. Grotius apparently said that, among the things that were to be regarded as the common property of all, is the sea 'because it is so limitless that it cannot become a possession of anyone, because it is adapted for use by all whether we consider it from the point of view of navigation or fisheries'. This Grotian argument, says Birnie, 'is much quoted as illustrating the basic fallacy of his theory, viz. that the fishery resources were inexhaustible'. She argues, however, that this 'is not entirely fair to Grotius' on the ground that Grotius seems to have distinguished as *not* marked out for common use 'such wild animals, fish and birds as can be reduced to possession and therefore become the objects of private ownership, whereas he though that the air and sea could never be privately acquired'.²⁴⁷⁷

²⁴⁷⁴ Personal communication Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

²⁴⁷⁵ *Ibid.* See 3.4.3 and (n 824) on the IWC's agreement, at an intersessional Meeting in March 2008, to improve coordination between the IWC and other relevant international conventions. ASCOBANS is the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (see, generally, <http://www.ascobans.org>). It is worth mentioning also the organisation ACCOBAMS, Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area, (see, generally, <http://www.accobams.org>). Both ACCOBAMS and ASCOBANS are Agreements concluded under the Convention on Migratory Species. See D.3 and (n 2521).

²⁴⁷⁶ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 44.

²⁴⁷⁷ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) 86-88.

D.2.2 Three Conventions on the Law of the Sea

Birnie writes that '[i]n the concluding years of the 1960s, in the 1970s and to December 10, 1972, all the IWC's meetings had proceeded against a background of preparations for, and negotiations at, the UNCLOS III'.²⁴⁷⁸ The United Nations Convention on the Law of the Sea (UNCLOS) was signed in 1982 and came into effect in November 1994. Negotiating the Convention took almost a decade and the treaty has been described, by Glazewski, as being 'the most elaborate world order bargain struck by the international community'.²⁴⁷⁹ UNCLOS, write Birnie and Boyle, 'was intended to be a comprehensive restatement of almost all aspects of the Law of the Sea'. They explain that the Convention 'attempts for the first time to provide a global framework for the rational exploitation and conservation of the sea's resources and the protection of the environment'; and argue that '[i]n many respects it has been a model for the evolution of international environmental law'.²⁴⁸⁰

D.2.3 UNCLOS and whaling

According to Birnie, '[d]uring the entire history of whaling, up to the present day, operations have been conducted in the international areas, which came to be known as the high seas, under a doctrine of freedom of access to them (a freedom which can be limited only with the consent of the participant states)'. She explains that this has been the case despite the doctrine being much criticised. Even, she says, 'in the negotiations which took place during [UNCLOS III] from 1973-1982, the doctrine was not seriously challenged, so far as it relates to the legal status of fish in high seas areas and the right to exploit them there'. Her conclusion is that it seems most likely that 'even after UNCLOS III the high seas fisheries will for the present remain, as they have been since international law first concerned itself with them, a common property resource, although there is no international treaty that specifically confers this status'.²⁴⁸¹

Vogler writes that 'we may identify three main global maritime issue areas'; with the first of these, 'the whaling issue area, concern[ing] a truly global common pool resource'. The whaling regime, he points out, being based upon a 1946 agreement, pre-dates all three UN Law of the Sea Conventions.²⁴⁸² 'Both whaling and pollution regimes', he adds, 'have a relationship to the 1982 Convention, which may be seen as providing an authoritative set of principles and norms relating to both the harvesting of maritime resources and the prevention of environmental degradation'.²⁴⁸³

Vogler may, however, be putting the relationship too strongly. It appears that the parties to the ICRW continue to treat it largely as a unique regime - although observers from numerous other conventions attend IWC meetings, it is highly debatable to what extent the IWC as a whole recognises linkages or whether it acts as though it is a sole power.

Per Birnie, Article 64 of UNCLOS 'requires states exploiting highly migratory species in a region to cooperate to ensure conservation both directly and through appropriate organizations'. She then explains that although Article 65 'makes specific and separate provision for conservation of marine mammals', this, as with Articles 61-64 and the Straddling Stocks Convention, focuses on conservation considerations. The Article (65) permits 'more strict limitation or regulation of exploitation of marine mammals', and 'creates a clear obligation on states to cooperate for their conservation'; and then

²⁴⁷⁸ *Ibid* at 375.

²⁴⁷⁹ J Glazewski *Environmental Law in South Africa* (1st ed, 2000) at 46.

²⁴⁸⁰ P Birnie & A Boyle *International Law & the Environment* (2nd ed, 2002) at 348.

²⁴⁸¹ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 77.

²⁴⁸² J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 47-48.

²⁴⁸³ *Ibid* at 47-48.

creates an obligation 'in the case of cetaceans in particular to work through the appropriate international organizations for their conservation, management and study'. The organizations appropriate to achieve these goals are not, however, identified; and '[n]either the coastal state nor a competent international organization are precluded from prohibiting marine mammal exploitation or regulating it more strictly than is required elsewhere in Part V of the UNCLOS'.²⁴⁸⁴

Article 65 reads as follows:

[n]othing in this part restricts the right of a coastal state or the competence of an international organisation, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organisations for their conservation, management and study.

Commenting on this, Schiffman writes that '[u]nder most circumstances, UNCLOS appears to attempt to effectuate a balance between the objectives of conservation and utilization in EEZs'; giving as an example the fact that in the 'case of highly migratory species (including some cetaceans), UNCLOS refers to both objectives'.²⁴⁸⁵ In the particular case of cetaceans, however, Schiffman says, 'the balance of UNCLOS' objectives may tip in favor of conservation'.²⁴⁸⁶ He argues that the 'plain language of Article 65 suggests that conservation concerns are paramount in the context of cetaceans, permitting stricter management standards than for other marine species'; and that '[a] precautionary approach is clearly justified given the historic record of over-exploitation of many cetacean species'.²⁴⁸⁷ The fact, he goes on, 'that Articles 65 and 120 single out cetaceans for greater conservation is problematic for states and organizations that argue cetaceans are a resource that may be utilized and consumed as any other marine resource'; but that '[t]o argue otherwise would ignore the legal maxim and general principle of law - *lex specialis derogat legi generali* - a specific law prevails over a general law'.²⁴⁸⁸

D.2.4 The Exclusive Economic Zone

The biggest direct change introduced by UNCLOS is that of the EEZ. Dahmani writes that '[the] concept of the [EEZ] is only a part of the proposed international economic order'; and that its 'full force may be better appreciated when it is recalled that most fish-stocks, about 94% of the world catch, come from within 200 miles of the coasts'. He then points out that, in respect of the exploitation of fishery resources, the EEZ is designed 'to redress the inequalities in the distribution of these resources between the developed and developing states'. He argues, however, that the EEZ concept, as far as the fishery resources are concerned, cannot be expected to redress this particular balance. In reality, he contends, the main beneficiaries of the EEZ concept 'are the rich and developed states like the US, Australia, Canada, Japan, the USSR, New Zealand, Indonesia, Mexico, Brazil, Norway and Chile'; while the 'biggest losers of all are the land-locked and geographically disadvantaged states which either cannot have an EEZ or the resources therein'.²⁴⁸⁹

The biggest indirect change introduced by UNCLOS is that a codification of the law of the sea has been introduced, agreed to by a vast majority of states and with an arbitral body - inherently, this has the potential eventually to bring all use of the sea under international control.

²⁴⁸⁴ P Birnie 'The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 123.

²⁴⁸⁵ H S Schiffman 'The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 159 at 171-72.

²⁴⁸⁶ *Ibid* at 171-72.

²⁴⁸⁷ *Ibid* at 171-72.

²⁴⁸⁸ *Ibid* at 171-72. See (n 430).

²⁴⁸⁹ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 22-23.

On the inequities created by the EEZ concept; Clover writes that '[t]he European Commission argues that fair access agreements are encouraged' under UNCLOS' EEZ regime; the theory being 'that fisheries access agreements established a means for poor nations to profit from the harvesting of a surplus they did not have the technical means to harvest themselves'.²⁴⁹⁰

Dahmani writes that one of the major justifications for introducing the UNCLOS EEZ regime, and coastal states' control over fish-stocks in adjacent maritime areas, was the argument that it would result in more efficient and equitable exploitation of the world's fisheries. Certainly, he says, 'the emergence of the coastal state as the dominant decision maker in fisheries management will result in many areas in a more rational exploitation'; but he warns that 'it has to be realised that the EEZ is only a step towards this objective'. In other words, he explains, 'the EEZ is only an enabling mechanism and it depends on the initiative of the individual coastal states to implement effective management and conservation schemes'. Another problem which he points to is that 'the fisheries regime of the EEZ has, ... in many ways oversimplified the problems of fisheries management'; as there 'are many major fisheries which cover more than one state's EEZ or cut across political boundaries into the high seas'.²⁴⁹¹

The implications of the new EEZ regime for whaling were initially of great concern to certain countries, and EEZ's were jealously guarded. Japan, for example, in its written Opening Statement to IWC 33 in 1981, stated that it wished to 'stress that the moratorium proposal as it attempts to apply to the stocks of whales within 200 miles off the coasts of whaling nations is to be regarded as an uncondonable challenge to the sovereign rights of the coastal states'.²⁴⁹² At the next meeting, IWC 34 in 1982, Japan made the same point; arguing that 'the proposal for a moratorium which would prevent member countries from utilising whale stocks in their coastal waters represents a flagrant infringement of the sovereign rights of those countries' and that '[t]he proposal is incompatible with the spirit of internationally established practice and customary law with respect to the 200 mile zone'.²⁴⁹³

D.2.5 The value of the UNCLOS principles

Already, the UNCLOS principles are important. Schiffman writes that '[b]eyond national jurisdiction, equally important is ... the High Seas, or that segment of the ocean where no state may exercise jurisdiction at the expense of another state'. He then points out that '[s]ince no state may exercise its sovereignty in this area, the principles of UNCLOS, applicable to every member, become all the more important in the management context'.²⁴⁹⁴ According to Schiffman, further, '[u]nder UNCLOS, one factor resonates loudly in the management of living resources'; which is 'the duty to cooperate with other states directly or through international organizations'. It is widely recognized, he argues, 'that international organizations provide an essential forum for international cooperation in relation to a spectrum of environmental issues'.²⁴⁹⁵

²⁴⁹⁰ C Clover *The End of the Line: How overfishing is changing the world and what we eat* (2005 (2004)) at 40-43. Clover writes that '[t]he European Commission likes to proclaim that access agreements can be a way of helping the African countries involved. But it continues to negotiate them furtively, like a guilty secret. Its latest "partnership" agreement with Senegal was conveniently negotiated just before the World Summit on Sustainable Development in Johannesburg in 2002, where the EU undertook to implement recovery plans for endangered stocks by 2015'. *Ibid* at 40-43. The cynic might point out, though, that if the EU was not taking fish off the West African coast, another predator would move in - China, perhaps. That is the nature of biodiversity - nature 'abhorring a vacuum'.

²⁴⁹¹ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 157-58.

²⁴⁹² 'Opening Statement by Japan' IWC 'Opening Statements at the Thirty-Third Annual Meeting' (20-25 July 1981, Brighton) IWC/33/OS/JAPAN at 1.

²⁴⁹³ Japan Commissioner, IWC 'Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton) *Verbatim Record* at 77.

²⁴⁹⁴ H S Schiffman 'The Competence of Pro-Consumptive International Organizations to Regulate Cetacean Resources' in

W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 159 at 172-73.

²⁴⁹⁵ *Ibid* at 173-74.

Clearly, within the context of the ICRW, it is arguable that such a duty to cooperate is observed largely in the breach by member states.

Friedheim writes that Article 65 of UNCLOS, ‘the only provision to deal with whales, conveys responsibility for whales to international organizations (please note the plural), but it is remarkably silent about where the responsibilities of coastal states end and those of international organizations begin, implying possible overlapping jurisdiction in the EEZ’.²⁴⁹⁶

Birnie and Boyle, however, point out that, although Article 65 does not ‘in terms require states to join any particular international body [but] merely to cooperate’ and, for cetaceans, to ‘work through’ *the* ‘appropriate body’, in the view ‘of many’ the IWC ‘is the only such body’.²⁴⁹⁷ The same writers then comment that UNCLOS does not ‘deal effectively or in detail with the crucial problem of common stocks, that is, stocks that migrate between or among zones, though it does address it in general terms’. They suggest, further, that UNCLOS ‘does not clearly endorse an ecosystem or habitat preservation approach, though its main article on conservation (Article 61) goes some way towards this and Article 194(5) is relevant to certain endangered species’ habitats’.²⁴⁹⁸

One of the more controversial aspects of UNCLOS is that there is no actual requirement to protect the high seas.²⁴⁹⁹

The Convention on Biological Diversity provides, in Article 22, that ‘[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity’. In other words, suggests de Klemm, where there is a conflict between the CBD and any other agreement with regard to the conservation of biological diversity, the provisions of the former will prevail. Strangely, however, this provision does not appear to apply to UNCLOS, as the CBD states that parties must implement the CBD consistently with their rights and obligations under UNCLOS.²⁵⁰⁰

D.2.6 The role of the IWC

Burke contends that an important ‘question is whether Article 120 requires a harvesting state to participate as a member of a specific international organization established to govern whaling on a global basis’. UNCLOS Articles 87 and 116 clearly allow, he says, the ‘high-seas harvesting of whales, as other marine living resources’; but he then asks: ‘must a state join a particular international organization with competence over whales before it may engage in whale harvesting?’ Further, he asks whether ‘[i]n carrying out its obligation to cooperate under Article 118, is the individual whaling state required to join a particular agency regulating whaling?’²⁵⁰¹ ‘Of several articles on living marine resources in general’, he argues, ‘UNCLOS contains two directly concerning whales, Articles 64 and 65 (which also apply to the high seas under Articles 116 and 120, respectively)’. He then argues that ‘[n]either supports the notion that harvesting whales by the national of a state party must be preceded by joining an international regulatory agency’.²⁵⁰²

²⁴⁹⁶ R L Friedheim ‘Fixing the Whaling Regime: A Proposal’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 324.

²⁴⁹⁷ P Birnie & A Boyle *International Law & the Environment* (2nd ed, 2002) at 667.

²⁴⁹⁸ *Ibid* at 656.

²⁴⁹⁹ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 42.

²⁵⁰⁰ C de Klemm (with C Shine) *Biological Diversity Conservation and the Law: Legal Mechanisms for Conserving Species and Ecosystems* IUCN Environmental Policy and Law Paper No. 29 (1993) at 25.

²⁵⁰¹ W T Burke ‘A New Whaling Agreement and International Law’ in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 51 at 53-54.

²⁵⁰² *Ibid* at 54-55.

Burke's argument is that no state is compelled to join the ICRW. In practice, however, membership of the IWC is increasing and it remains *de facto* the only significant regime - it is the main battlefield. The reason for the argument being made that states are not compelled to join appears, from Burke's analysis, to be that certain IWC members have perverted the purpose of the convention. 'Furthermore', writes Burke, 'the appropriateness of the IWC as a single agency is highly questionable'; and 'under the current controlling group within the IWC, the ICRW regime has been defined, twisted may be a better word, to embody an objective not shared by all members and not even consistent with its basic charter'. 'Under such circumstances', he argues, 'the prospect of interpreting UNCLOS to require adherence to the ICRW as a condition of entering into whaling is not only appalling but most likely self-defeating'; and 'states insisting on this view of UNCLOS cannot be taken as serious defenders of whale conservation'.²⁵⁰³ In further support of this argument, he claims that 'no member state has yet provided a reasoned statement for departing from the treaty's terms'; and that the 'only proffered justification is strictly political, as in the declaration of the United States that it cannot support sustainable takes of whales because there is no political support for doing so in the Congress, as if this adequately explained and even justified its refusal to abide by its treaty obligations'.²⁵⁰⁴

Burke then writes that under Agenda 21, point 17.61, 'states recognize (a) the responsibility of the International Whaling Commission for the conservation and management of whale stocks and the regulation of whaling pursuant to the 1946 International Convention for the Regulation of Whaling'...'.²⁵⁰⁵ Per Burke further, '[i]n sum, whaling is permissible under general international law subject to the duty to conserve, a duty that under UNCLOS Article 64 can be discharged through direct interaction with other states or through international organizations'.²⁵⁰⁶

Continuing with Burke's argument; he then writes that '[t]he fundamental point is that states have a right to harvest living resources of the high seas under customary law and under the 1982 Law of the Sea treaty'; and that '[i]f there are to be restrictions on that right by another agreement, to which reference is made in Article 116 of the UNCLOS treaty, those restrictions can be imposed only in accordance with such agreement'.²⁵⁰⁷ The position, he says, is that, in accepting the UNCLOS treaty, 'states agree to limit their right to take whales by reference to obligations assumed under other relevant international agreements'; but this cannot be seen as 'an agreement to accept restrictions on whaling that exceed those authorized by the other international agreement' as the imposition of restrictions 'by measures not consistent with the ICRW is a violation of the UNCLOS treaty itself'.²⁵⁰⁸

Stone comments that Burke 'makes a powerful case that neither UNCLOS nor customary law compels all whaling to take place under the ICRW'; and that it 'is not that international law lacks a general duty to cooperate and to conserve on whaling'.²⁵⁰⁹

As significant as it is, as an ambitious codification and as a convention with vast potential, UNCLOS is clearly - at the current time - inadequate. As Dahmani comments, 'it is necessary to point out that it is perhaps unrealistic to expect this Convention to provide adequate and complete solutions to all the

²⁵⁰³ *Ibid* at 55-56.

²⁵⁰⁴ *Ibid* at 55-56.

²⁵⁰⁵ *Ibid* at 57-58. See 'Report of the United Nations Conference on Environment and Development' Agenda 21 'Chapter 17: protection of the Oceans, all kinds of Seas, including Enclosed and Semi-enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources'

http://www.un.org/Depts/los/consultative_process/documents/A21-Ch17.htm.

²⁵⁰⁶ *Ibid* at 58.

²⁵⁰⁷ *Ibid* at 62-63.

²⁵⁰⁸ *Ibid* at 63-64. Burke does advise that '[u]nder contemporary international law ... if there is political willingness in the IWC to seek a third-party, objective, neutral decision maker to resolve differences or to give an advisory opinion about differences over what the IWC is authorized to do under the ICRW, there is no longer any doubt about the availability of such a tribunal'. *Ibid* at 65.

²⁵⁰⁹ C D Stone 'Summing Up: Whaling and Its Critics' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 269 at 273-75.

problems of fisheries management'. The Convention, he says, 'is a political document negotiated over a period of more than 10 years by more than 150 independent states' and '[t]he difficulties of arriving at optimum solutions in these circumstances are very obvious'.²⁵¹⁰

On at least one occasion, a party to the IWC suggested taking a dispute to resolution in terms of the UNCLOS dispute resolution provisions. At IWC 50 in 1998, Japan suggested that the IWC 'acted outside the terms of the Convention', without scientific justification and without taking into account the interests of whale consumers and the whaling industry, and that it should consider the disputes resolution provisions under UNCLOS.²⁵¹¹ Given the voting weights at the time in the Commission, however, there was never any chance of the suggestion being agreed to by a majority. The possibility does remain, however, that Japan or another aggrieved member could try the tactic again in the future.²⁵¹² Should it be an anti-whaling State that chose to make such an attempt, it would do well to remember Japan's words of 1998.

D.3 The Convention on the Conservation of Migratory Species of Wild Animals (Bonn) 1979

D.3.1 The Convention and CITES

The Parties to the Convention on Migratory Species (the Bonn Convention) 'acknowledge the importance of migratory species being conserved' and also of 'Range States agreeing to take action to this end whenever possible and appropriate' with special attention being paid to those migratory species with 'unfavourable' conservation statuses - and agree to take 'appropriate and necessary steps to conserve such species and their habitat'.²⁵¹³ As at the time of writing in 2008, there were 108 Parties.²⁵¹⁴ Japan is not a party and nor is the US; South Africa is, with the Convention having entered into force in 1991.²⁵¹⁵

It has been suggested that there are distinct and fundamental differences between the Bonn Convention and CITES. According to Lyster ²⁵¹⁶ ... [t]he fundamental objective of the Bonn Convention is to protect migratory species' and that to achieve this 'the Convention has two quite distinct sub-objectives'. The first of these is 'to provide strict protection for species listed in Appendix I, which consists of migratory species in danger of extinction throughout all or a significant portion of their range'.²⁵¹⁷ 'The second sub-objective', per Lyster, 'is to persuade Range States to conclude Agreements for the conservation and management of Appendix II species'.²⁵¹⁸

²⁵¹⁰ M Dahmani *The Fisheries Regime of the Exclusive Economic Zone* (1987) at 159.

²⁵¹¹ IWC 'Chairman's Report of the Fiftieth Annual Meeting' (16-20 May 1998, Oman) at 27.

²⁵¹² See (n 418) and (n 627).

²⁵¹³ Article II(1) 'Article II: Fundamental Principles' Convention on Migratory Species, 1979

http://www.cms.int/documents/convtxt/cms_convtxt.htm.

²⁵¹⁴ 'List of CMS Parties' Convention on Migratory Species, http://www.cms.int/about/Partylist_eng.pdf (accessed 5 June 2008).

²⁵¹⁵ *Ibid.*

²⁵¹⁶ '[As a result of UNCHE 1972 Recommendation 32 of the Action Plan - "that governments should consider the need to enact international conventions and treaties in order to protect species which inhabit international waters or migrate from one territory to another"] the [Bonn Convention] was [] concluded on 23 June 1979 ... [and came] in[to] force 1 November 1983'. S Lyster *International Wildlife Law* (1985) at 278-80.

²⁵¹⁷ '... The Convention seeks to protect Appendix I species by imposing strict conservation obligations on Parties [fn 3: Cameroon, Chile, Denmark, Egypt, European Economic Community, Hungary, India, Ireland, Israel, Italy, Luxembourg, the Netherlands, Niger, Portugal and Sweden are full Parties. Central African Republic, Chad, Federal Republic of Germany, France, Greece, Ireland, (*sic*) Ivory Coast, Jamaica, Madagascar, Malawi, Morocco, Norway, Paraguay, Philippines, Somalia, Spain, Sri Lanka, Togo, Uganda and UK have signed but not yet ratified.] that are "Range States". ...'

S Lyster *International Wildlife Law* (1985) at 278-80.

²⁵¹⁸ *Ibid* at 278-80.

‘Migratory species’, in Lyster’s words, ‘are eligible for Appendix II either if they have an unfavourable conservation status and require international agreements for their conservation or if they have a conservation status which would significantly benefit from international cooperation’.²⁵¹⁹ His assessment is then that the Bonn Convention ‘does not follow the pattern adopted by CITES whereby species are listed in Appendix I or II depending, among other things, upon their level of endangerment’.²⁵²⁰

Mulvaney and McKay write that ‘[t]his is a global convention that has also enabled subsidiary regional conservation agreements to be adopted’.²⁵²¹ Lyster contends that there are three reasons why the Bonn Convention is ‘particularly interesting’. ‘It covers’, he writes, ‘an unusually broad range of threats to the survival of Appendix I species, its provisions are unusually rigorous in their restrictions on the taking of Appendix I species, and there is no precedent in international wildlife law for the system of Agreements set up to help migratory species which would benefit from international cooperation in their conservation and management’.²⁵²²

D.3.2 The Convention and the IWC

Writing in 1985, Birnie suggests that the CMS ‘covers *all* migratory species throughout the world’ including ‘marine mammals, fish, crustacea and molluscs’. It is based, she says, ‘on the concept that resources that cross national boundaries are shared resources, not national property, and thus require international protection’.²⁵²³ This is an interesting advance on the traditional ideas of sovereignty, which might have held that states were free to take wild animals temporarily within their borders. States, per Birnie, ‘must be the protectors of species passing through national boundaries’, and this requires ‘concerted action [by] all states’ within such boundaries’.²⁵²⁴

²⁵¹⁹ *Ibid* at 278-80. Per Lyster, ‘[t]wo elements [] are noteworthy. Firstly, the Convention does not impose direct obligations on Range States to protect Appendix II species - it merely requires Range States to conclude further Agreements for their protection and establishes guidelines as to what these Agreements should contain. Secondly, a species does not need to be, although it may be, threatened or even potentially threatened with extinction in order to qualify for Appendix II. The important criterion is whether or not the species would benefit from the international cooperation that an Agreement would bring’. *Ibid* at 278-80.

²⁵²⁰ *Ibid* at 278-80. Per Lyster, ‘Article I(1)(a) defines a “migratory species” as “the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries”’. Four points about this definition are noteworthy: (i) By allowing geographically separate populations of a species to be considered independently, the Bonn Convention is following a precedent set by CITES. In the context of CITES the concept has proved extremely useful in enabling a State with a non-endangered, well managed population of a species which is endangered in other States to allow limited exploitation of its population and, conversely, in enabling States to single out endangered populations of a species for special protection when populations elsewhere are not endangered. ... (ii) Defining a species as migratory if a “significant portion” of its members migrate allows the inclusion of relatively sedentary species ... (iii) The intention behind the word “periodically” [in the last Draft] was to include species living in border areas which might be relatively sedentary but which nevertheless wandered back and forth across national frontiers on a regular basis. “Periodically” was replaced by the words “cyclically and predictably” ... (iv) The definition adopted by the Final Conference includes *all* species of migratory animals notwithstanding attempts during the course of negotiations by several countries, including Australia, Canada, Japan, New Zealand, the USA and the USSR, to exclude certain marine species, particularly finfish and shellfish, on the grounds that their inclusion could undermine existing and pending international agreements and negotiations’. *Ibid* at 280-82.

²⁵²¹ K Mulvaney & B McKay ‘Small Cetaceans: Status, Threats, and Management’ in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 189 at 209. The writers explain that ‘[t]wo of these agreements cover small cetaceans: the 1992 [ASCOBANS] and the 1996 [ACCOBAMS]. Both these agreements commit the signatories to maintaining the favourable conservation status for small - and, in the case of ACCOBAMS, all - cetacean species and populations in the region’. *Ibid* at 209. See (n 2475).

²⁵²² S Lyster *International Wildlife Law* (1985) at 297.

²⁵²³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 513-514.

²⁵²⁴ *Ibid* at 513-514. Birnie comments that ‘[i]t must be admitted that the hesitant and imperspicuous terminology of this Convention indicate that whilst its aims and principles are an improvement on the IWC its interpretation and execution may give rise to the political bargaining and evasion that occurs under the latter. The deletion of a proposed principle, that

At IWC 50 in 1998, the Secretariat of the CMS delivered a Statement in which it said that '[t]he aims and purposes of IWC and CMS are convergent in many aspects as regards most species of cetaceans, CMS being active in particular with small cetaceans'. The Statement said also that the 'Secretariats of IWC and CMS are aiming to strengthen communication and consultation between these two institutions'; and that, while '[u]nfortunately, the pressure of other priorities has prevented them from further action,' it is 'hoped that progress can be made soon'.²⁵²⁵

At IWC 52 in 2000, the IWC adopted a Memorandum of Understanding between the IWC and the CMS. Three countries noted reservations, however. Japan considered it 'inappropriate to cooperate with CMS' as certain Agreements concluded under the CMS 'protect small cetaceans only' and therefore, in Japan's view, 'deny the use of cetaceans as resources, which contradicts the position of the ICRW'. Norway supported this, arguing that programmes under the CMS primarily focus 'on protection rather than management'. The PR of China associated itself with Japan's argument.²⁵²⁶

D.3.3 The Convention and Japan

Sand points out that the Bonn Convention's usefulness is extremely limited as Japan is not a party. He explains that Japan was in 1979 part of the so-called 'Pacific Alliance' of coastal states (which included Canada, Russia and the US) which 'were categorically opposed to the listing of marine species in the CMS appendices and which have continued to boycott the Convention since'.²⁵²⁷

D.4 The Convention on Conservation of European Wildlife and Natural Habitats (Berne) 1979

D.4.1 The Convention

Mulvaney and McKay write that this Convention 'charges signatories with conserving wild flora and fauna and their natural habitats, especially species whose conservation requires the cooperation of several states and particularly migratory species'.²⁵²⁸ Lyster writes that it '²⁵²⁹ ... [i]mposes a clear and unequivocal legal obligation on Parties to protect all important breeding and resting sites of the hundreds of species of animals in Appendix II'.²⁵³⁰ There are, Lyster explains, two aspects of the Berne Convention which are especially important. The first of these is that 'almost every one of its provisions is mandatory as opposed to being couched in the hortatory language used by so many wildlife treaties'; and the second is 'the system of administration it has created to promote and oversee its implementation'. It cannot be over-emphasised, he says, 'how vital it is to the enforcement of a wildlife

migratory species should be conserved in accordance with ecological principles, is a considerable setback to the emergence of this principle as a rule of customary international law'. *Ibid* at 517. More than 20 years after she wrote these words, it is safe to say that her cautionary tone has proved accurate.

²⁵²⁵ IWC 'Documents of the Fiftieth Annual Meeting' (16-20 May 1998, Oman): 'Progress Report' from the Convention on the Conservation of Migratory Species of Wild Animals (CMS)(IWC/50/OS/CMS).

²⁵²⁶ IWC 'Chairman's Report of the Fifty-Second Annual Meeting' (3-6 July 2000, Adelaide) at 43.

²⁵²⁷ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:2 *RECIEL* 56 at 59, fn 35.

²⁵²⁸ K Mulvaney & B McKay 'Small Cetaceans: Status, Threats, and Management' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 189 at 209.

²⁵²⁹ Per Lyster, the Convention 'opened for signature [in] 1979 ... came into force on 1 June 1982. ... [and] provides for the conservation of wildlife and wildlife habitats in general and for the special protection of species listed in Appendix I (strictly protected plants), Appendix II (strictly protected animals) and Appendix III (protected animals) ...'. S Lyster *International Wildlife Law* (1985) at 129-30.

²⁵³⁰ *Ibid* at 129-30. Lyster explains that '[t]he Convention permits Parties to exempt themselves from these obligations in certain limited circumstances, but in no event are Parties allowed to exercise their right of exemption if the result will be detrimental to the survival of a species or population thereof'. *Ibid* at 129-30.

treaty that there are mechanisms such as a Secretariat, regular meetings of Parties and reporting requirements' designed 'to keep Parties on their toes'.²⁵³¹

It is interesting to see how the Parties to a Convention *can* make an effort to include mandatory protectionist provisions. It tends to be easier, however, to achieve the inclusion of such commitments in a regional, rather than a global, Convention.

Birnie writes that '[t]his regional convention, ... introduces another new ecologically based conservation technique - preservation of habitats'. Its special object, contained in Article I(1) is, she says, to conserve 'those species and habitats whose conservation requires the cooperation of several states, and to promote such cooperation'. Article II, she says, 'emphasises the conservation of endangered and vulnerable species, including migratory species'.²⁵³²

D.5 The Convention on Conservation of Antarctic Marine Living Resources

D.5.1 The Convention

Birnie writes that '[a]lthough not concluded until 1980, this treaty resulted from extensive discussions and preparations in the 1970's'. Her assessment is that the treaty 'evidences the developing views on conservation of that period especially concerning a more ecological approach to management, although the politics of Antarctica played a dominating role in confining its membership'.²⁵³³

It is interesting, and illuminating, to consider the development of the treaty as an early example - perhaps even the first proper such example - of a treaty taking an 'ecological' approach, rather than a primarily anthropocentric approach. Birnie writes that '[t]he CCAMLR consists of a Preamble and thirty three articles, and is a radical legal development being not so much a fisheries convention in the old mould' as it is a 'broad Convention for conservation of the Antarctic environment and ecosystem'. It takes, she says, a 'broad ecological approach to conservation of the Antarctic environment and ecosystem, that could provide a model for a revised ICRW'; but that this idea is, however, 'objectionable to some states, which see ecological criteria for conservation as a potential threat to resource exploitation'.²⁵³⁴

This is extremely ironic comment, given the recent adoption of the 'ecological approach' by proponents of commercial use of whales.

Lyster writes that 'CCAMLR obliges its Parties' to adopt an 'ecosystem approach' to the exploitation of Antarctic marine living resources. This means, for example, he explains, 'that when the Commission sets catch limits on krill fishing, it must not only consider the impact on krill populations but also the impact on populations of other animals, such as whales and penguins, which depend upon krill for food'. The 'traditional approach of fisheries treaties is', he says, 'to consider only the stock being fished when setting harvest levels'.²⁵³⁵

²⁵³¹ *Ibid* at 129-30.

²⁵³² P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) at 518.

²⁵³³ *Ibid* at 522. Birnie writes that '[a] significant development for the IWC was the conclusion in 1959 of the Antarctic Treaty to ensure the peaceful use of that area and enable cooperation in scientific research. It had been preceded in 1957 by the establishment of the Scientific Committee on Antarctic Research (SCAR). ... The Antarctic Treaty states have always ... worked closely with SCAR. They also in 1980 concluded a Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)'. *Ibid* at 276-277.

²⁵³⁴ *Ibid* at 525. Birnie advises that '[t]he Preamble recognises the need to protect "the integrity of the ecosystem" of the seas surrounding Antarctica (although it does not fully define this term) ... Unlike the ICRW, CCAMLR has a specific geographic scope'. *Ibid* at 526-27.

²⁵³⁵ S Lyster *International Wildlife Law* (1985) at 156-58.

Hoyt tells us that '[t]he 29 nations signing this convention are bound to a proactive approach, investigating the impact of not only targeted species, but also the predators and prey of that species'. He suggests that CCAMLR's mandate - 'to institute ecosystem-based management in fisheries' - may prove to be 'a landmark not just for Antarctica but for the world'.²⁵³⁶

There is criticism of the Convention too, however. M'Gonigle writes that '[d]espite the importance and sensitivity of this huge Antarctic ecosystem, the interstate negotiations [toward the Convention] produced provisions for scientific review and regulation that do not fulfill the objectives of the new convention'. In this light, he explains, 'the proposed decision-making procedure takes on great significance'; but that, '[n]ot surprisingly, it too is deficient'. His view is that the procedure is even more restrictive than the IWC's three-quarter majority rule, in that 'the proposal requires consensus (unanimous) voting plus an objection procedure on substantive issues that allows any state to reject any decision'; and that, '[m]oreover, there is no mandatory dispute settlement requirement'. He then adds that the new convention 'is badly deficient in two other important areas'. The test, he says, 'of any system is its implementation, and the SOC ['Southern Oceans Convention'] does little to strengthen traditional practices there. It does not provide for inspection procedures or guarantees of access'. He argues finally that, 'following the uniform desire of the treaty parties to exclude the rest of the world from the Antarctic bonanza, the SOC does not recognize the interests of the larger world community and refers only incidentally to other international organizations'. He argues then that, despite many legal arguments put forward that the Antarctic should be considered the 'common heritage of mankind', there has been 'no recognition of any entitlement by the Third World to the protein value of krill'. Membership of the Convention is apparently 'limited to countries having a demonstrated interest in Antarctic exploitation or research, and before a state may join the convention, it must accept the treaty powers' special claims to the area'. In conclusion, argues M'Gonigle, 'there remain serious obstacles to the successful conservation of Antarctic krill, of those species dependent upon it, and perhaps of the larger oceanic ecosystem'; and, '[u]nder these circumstances, the international community beyond the Antarctic treaty powers should not hesitate to reject the new SOC'.²⁵³⁷

The United States comes in for criticism too; M'Gonigle writing that '[i]n this diplomatic game, the performance of the avowedly conservationist [US] has been particularly disappointing'. The US, he says, 'not only could have prevented this weak regime from being adopted, it also could have exerted its influence to ensure that a strong treaty was adopted'. He explains that sometimes it is crucial to have coercive power - this being in situations 'where the absence of agreement benefits only the exploiters'. It seems, however, that the US, 'chose not to exert much pressure'; and that this choice 'exemplifies the almost mutually exclusive relationship that exists between economic and ecological interests'.²⁵³⁸ One must feel for the US on this one - often criticised for throwing its weight around; here it finds itself being criticised for *not* doing exactly this. M'Gonigle then suggests that '[f]or the [US] and other treaty powers to forgo the environmental benefits of [] broad-based participation in the Commission and to pursue the problematic and very long-term goal of exploiting the mineral and energy wealth of the southern ocean is to follow an outdated conception of security and self-interest'.²⁵³⁹

D.5.2 The Convention and the IWC

On the question of cooperation between the CCAMLR and the IWC; Birnie writes that '[t]he conclusion of this treaty was undoubtedly a most important development'. She explains that this is because of its 'adding new techniques to the strategy for conservation of cetaceans in Antarctica,

²⁵³⁶ E Hoyt *Marine Protected Areas for Whales, Dolphins and Porpoises: A World Handbook for Cetacean Habitat Conservation* (2005) at 98.

²⁵³⁷ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 225-231.

²⁵³⁸ *Ibid* at 225-231.

²⁵³⁹ *Ibid* at 225-231.

[including] an ecological approach to management of a large marine area, including dependent species; the need to cooperate with states controlling common stocks and to develop mechanisms for collaboration with other concerned organisation’.²⁵⁴⁰

At the 1980 meeting of the IWC, IWC 32, a Resolution was adopted on cooperation and coordination between the IWC and the (then-proposed) CCAMLR.²⁵⁴¹ In the Resolution it was resolved that:

WHEREAS it is the purpose of the [IWC] to provide for the effective world wide conservation and management of whale stocks; WHEREAS the stocks of whales utilising the Southern Ocean constitute an important part of the responsibilities of the [IWC]; ... WHEREAS Article VI of the [CCAMLR] includes provisions that nothing in that Convention shall derogate from the rights and obligations of Contracting Parties under the [ICRW]; WHEREAS Article IX of the [CCAMLR] provides [that there] should [be measures taken to provide that there will be] no inconsistency between obligations of Contracting Parties under such regulations or measures and conservation measures which may be adopted by the Commission; ... The [IWC] ... BELIEVING that parties to the [CCAMLR] in the development of the administrative and procedural mechanisms of the Convention, will give consideration to the role of the [IWC] in the management and conservation of whales in the Southern Ocean ... REQUESTS that the [IWC] be given appropriate status in order that it can contribute to activities of the proposed Commission [of the CCAMLR]. SIMILARLY the [IWC] offers a corresponding contributory role in its activities to the representatives of the proposed Commission [of the CCAMLR].²⁵⁴²

Birnie argued in 1985 that the relationship between the two treaties must, and will, be developed. ‘The need’, she writes, ‘for a close relationship between the IWC [and the] CCAMLR ... was clearly established [at the first meeting, Hobart, in] 1982’; whereas ‘the nature and mechanism of the working relationship was not, but in November 1982 discussions took place between the Secretary of the IWC and the CCAMLR Executive Secretary’. These two apparently agreed that ‘under the IWC Rules of Procedure the mechanism already exists for permitting CCAMLR observers to attend both IWC and SC Meetings’ and that ‘the IWC has adopted a Resolution allowing CCAMLR to do so’. These informal discussions, according to Birnie, ‘are no more than a starting point’ and ‘further action to formalise the relationship will be needed if the essential close cooperation is to be established’; and the ‘IWC Secretary intends to establish links between the Secretariats similar to those existing between IWC and CITES’.²⁵⁴³

AT IWC 34 in 1982 Australia stated that it believed that ‘liaison and co-operation between the IWC and other organisations concerned either directly or indirectly with whales is necessary for the long term conservation of whales’. Australia argued that this was particularly so in relationship to the CCAMLR.²⁵⁴⁴

Gales, Kasuya, Clapham and Brownell contend that ‘[a] better understanding of the Southern Ocean ecosystem is critical to considerations far beyond the management of whales’. According to these writers, ‘[o]ceanography, and studies addressing climate change and fishery management have led to a series of successful multi-disciplinary, multi-national collaborations’. They then point out that CCAMLR, ‘to which Japan is a signatory, applies an ecosystem approach to the conservation and

²⁵⁴⁰ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume I* (1985) 531.

²⁵⁴¹ IWC Resolution on Cooperation and Coordination Between the International Whaling Commission and the Proposed Commission for the Conservation of Antarctic Marine Living Resources IWC ‘Chairman’s Report of the Thirty-Second Annual Meeting’ (21-26 July 1980), Brighton at 30.

²⁵⁴² IWC Resolution on Cooperation and Coordination Between the International Whaling Commission and the Proposed Commission for the Conservation of Antarctic Marine Living Resources IWC ‘Chairman’s Report of the Thirty-Second Annual Meeting’ (21-26 July 1980), Brighton at 30.

²⁵⁴³ P Birnie *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Regulation of Whale-Watching: Volume II* (1985) at 580-81.

²⁵⁴⁴ Australia Commissioner, IWC ‘Report of the Plenary Sessions of the Thirty-Fourth Annual Meeting’ (19-24 July 1982, Brighton) *Verbatim Record* at 181.

rational use of the Southern Ocean's living resources (primarily krill and fish)'. To this end, they say, 'CCAMLR's members have a strong history of ecosystem research, and of developing ecosystem models'; and that '[s]tudying the biomass and dynamics of krill and krill predator populations (including whales, the data on which come from the IWC) are within the mandate of CCAMLR'. In contrast, they argue, 'Japan's proposal to unilaterally conduct its whale-focuses ecosystem-scale research, isolate it from the benefits of multi-disciplinary scientific input and collaboration'.²⁵⁴⁵

Interviewed, however, Donovan told the present writer that the relationship between the IWC and the CCAMLR occurs mostly at the scientific level.²⁵⁴⁶

Sand points out that Article VI of CCAMLR 'expressly reserves (and hence would give priority to) treaty rights and obligations of member states under' the ICRW,²⁵⁴⁷ which would, of course, severely limit the relevance of CCAMLR to any dispute between IWC members.

D.6 The Antarctic Treaty System, and the Madrid Protocol to the Antarctic Treaty

D.6.1 The System and the Protocol

Basically, the Antarctic Treaty System is the network of instruments which governs the interactions between States with interests in the Antarctic region. Originally, these were the 12 States which adopted the Antarctic Treaty in 1959 - there are currently 45 Parties.²⁵⁴⁸ Perhaps reflecting the post-war and 'cold war' concerns of the late 1950s, the Antarctic Treaty does not, in its Preamble, focus specifically on environmental protection. Instead, the focus is on peace - the Parties '[r]ecognizing that it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord'.²⁵⁴⁹

The Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) was adopted in 1991, and entered into force in 1998 - having been ratified by all 26 of the Antarctic Treaty Consultative Parties; there are now 28 such Parties.²⁵⁵⁰ The Madrid Protocol commits its Parties to 'comprehensive protection of the Antarctic environment'; and establishes a body known as the Committee for Environmental Protection in order to collate data and provide expert advice to the Antarctic Treaty Consultative Meetings.²⁵⁵¹

According to the Protocol's Article 2: Objective and Designation, the Parties 'commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science'.²⁵⁵² This and various other Articles are clearly designed to broaden the scope of the Antarctic Treaty, specifically to include ecosystems not on the Antarctic land mass. This would clearly apply to cetaceans in the Antarctic area, and to the interrelationships between cetaceans and other species in the area.

²⁵⁴⁵ N J Gales; T Kasuya; P J Clapham & R L Brownell Jr 'Japan's whaling plan under scrutiny' (16 June 2005) 435 *Nature* 883 at 884.

²⁵⁴⁶ *Personal communication* Interview with Greg Donovan, Cambridge, 1 February 2007; E Couzens.

²⁵⁴⁷ P H Sand 'Japan's 'Research Whaling' in the Antarctic Southern Ocean and in the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' (2008) 17:1 *RECIEL* 56 at 60.

²⁵⁴⁸ Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, USSR, UK, US. There are now 45 Parties, as at January 2008. 'The Antarctic Treaty' *Scientific Committee on Antarctic Research (SCAR)* http://www.scar.org/treaty/at_text.html.

²⁵⁴⁹ Preamble and Article I, *ibid.*

²⁵⁵⁰ 'Environmental Protocol' British Antarctic Survey: Natural Environment Research Council http://www.antarctica.ac.uk/about_antarctica/geopolitical/environmental_issues/environmental_protocol.php (accessed 5 June 2008).

²⁵⁵¹ *Ibid.*

²⁵⁵² Article 2: Objective and Designation 'Protocol on Environmental Protection to the Antarctic Treaty' http://www.ats.aq/documents/recatt/Att006_e.pdf.

Owen has pointed out that all of the Antarctic Treaty, the Madrid Protocol, CCAMLR, the ICRW and the CMS have potential for cetacean conservation; and argues that none of them can be considered in isolation. He argues that a cetacean could be classified as a ‘specially protected’ species under the Madrid Protocol - but adds that what might be done depends upon ‘much interpretation’ and especially on willingness to apply the Protocol’s provisions beyond merely coastal waters.²⁵⁵³

D.6.2 The problem

However, the six Annexes to the Protocol are considered integral parts of the Protocol - and Annex II (Fauna and Flora) contains Article 7: Relationship with other Agreements outside the Antarctic Treaty System.²⁵⁵⁴ Article 7 reads starkly: ‘Nothing in this Annex shall derogate from the rights and obligations of Parties under the International Convention for the Regulation of Whaling’.²⁵⁵⁵

The implications of this are that the Parties to the Environmental Protocol realised the need for proper environmental management to take account of all aspects of the ecosystem under consideration - but were not able to obtain consent from all Parties without allowing them the ability to exclude whales from the auspices and authority of the Protocol, if need be in the view of any Party. As with UNCLOS, then, it seems that whaling is so contentious an issue that States need to allow it to stand as an ‘issue area’ apart, if agreement is to be reached.

D.7 The Straddling and Highly Migratory Fish Stocks Convention

Many species of fish migrate continually between the high seas and the coastal waters (EEZs) of various states. Likewise, many marine mammals breed in certain waters and migrate seasonally to others in order to mate or feed. This convention is intended to fill gaps left by the LOSC - in particular, the rights of coastal states and general questions of ecosystem protection.

According to the homepage for the Convention,²⁵⁵⁶ hosted on the United Nations Law of the Sea website, the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks sets out principles for the conservation and management of those fish stocks and establishes that such management must be based on the precautionary approach and the best available scientific information. The Agreement elaborates on the fundamental principle, established in the Convention, that States should cooperate to ensure conservation and promote the objective of the optimum utilization of fisheries resources both within and beyond the exclusive economic zone. The Agreement attempts to achieve this objective by providing a framework for cooperation in the conservation and management of those resources. It promotes good order in the oceans through the effective management and conservation of high seas resources by establishing, among other things, detailed minimum international standards for the conservation and management of straddling fish stocks and highly migratory fish stocks; ensuring that measures taken for the conservation and management of those stocks in areas under national jurisdiction and in the adjacent high seas are compatible and coherent; ensuring that there are effective mechanisms for compliance and enforcement of those measures on the high seas; and recognizing the

²⁵⁵³ D Owen ‘Use of CCAMLR and the Madrid Protocol for Cetacean Conservation in the Southern Ocean’ Paper delivered at the *Tenth International Wildlife Law Conference* Stetson University College of Law, American Society of International Law, etc, at the University of Granada Faculty of Law, 6-7 March 2008, Granada, Spain.

²⁵⁵⁴ Article II to the Protocol on Environmental Protection to the Antarctic Treaty: Conservation of Antarctic Fauna and Flora ‘Protocol on Environmental Protection to the Antarctic Treaty’ http://www.ats.aq/documents/recatt/Att009_e.pdf.

²⁵⁵⁵ *Ibid.*

²⁵⁵⁶ See http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm.

special requirements of developing States in relation to conservation and management as well as the development and participation in fisheries for the two types of stocks mentioned above.²⁵⁵⁷

The Agreement was adopted on 4 August 1995 by the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks and opened for signature on 4 December 1995. The Agreement entered into force on 11 December 2001, ie 30 days after the deposit of the thirtieth instrument of ratification or accession, in accordance with article 40(1) of the Agreement.²⁵⁵⁸ As at June 2008, there 71 ratifications.²⁵⁵⁹

Rose and Paleokrassis suggest that '[i]t should be noted that the 1995 Fish Stocks Agreement is not intended to apply to marine mammals'.²⁵⁶⁰ The SHMFSC arguably does not, therefore, take an ecosystem approach, despite the precedent of CCAMLR doing so.²⁵⁶¹

Friedheim argues that '[t]he world community is struggling toward a right to allocate and exclude nonpermitted claimants in some newer fisheries agreements such as the Straddling Stocks Agreement'.²⁵⁶²

Birnie writes that '[a]lthough a number of regional fisheries commissions already exist through which these goals can be achieved, no coherent body of principles and responsibilities for coordinating their activities at the international level existed until the recent entry into force [December 2001] of the 1995 UN Agreement for the Implementation of the Provisions of the 1982 United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (... the SFA)'.²⁵⁶³ 'Additionally,' she says, 'the SFA acknowledges the importance of a cooperative approach to fisheries management regimes and demands compatible conservation and management emphasising the interdependency of stocks.' Finally, she explains, 'the SFA recognizes that, as holistic management is required, neither coastal nor distant water fishing states can manage stocks in isolation ...'.²⁵⁶⁴

D.8 The World Trade Organisation (WTO)

D.8.1 The WTO and environmental matters

Sands writes that '[g]lobal free trade rules look boring and seem innocuous' with '[m]ost international lawyers try[ing] to steer well clear of them'. In fact, he goes on, 'they have become the most powerful rules of international law and fuel the engine of economic globalization - which is why they cause people to take to the streets in protest'; and why they have become 'the focus for increasingly bitter claims that international laws are being used by groups of rich countries, led by the US and the EU, to

²⁵⁵⁷ See Oceans and Law of the Sea: Division for Ocean Affairs and the Law of the Sea (available at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm, accessed 13 September 2006).

²⁵⁵⁸ *Ibid.*

²⁵⁵⁹ See 'Chronological list of ratifications' 4 June 2008

http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm# (accessed 5 June 2008).

²⁵⁶⁰ G Rose & G Paleokrassis 'Compliance with International Environmental Obligations: A case study of the International Whaling Commission' in J Cameron; J Werksman & P Roderick *Improving Compliance with International Environmental Law* (1996) 148 at 151.

²⁵⁶¹ See *Annex D.5*.

²⁵⁶² R L Friedheim 'Fixing the Whaling Regime: A Proposal' in R L Friedheim (ed) *Toward a Sustainable Whaling Regime* (2001) 311 at 318.

²⁵⁶³ P Birnie 'The Framework for Conservation of Whales and other Cetaceans as Components of Marine Biodiversity' in W C G Burns & A Gillespie (eds) *The Future of Cetaceans in a Changing World* (2003) 99 at 121-23.

²⁵⁶⁴ *Ibid* at 121-23. Birnie writes that '[t]he parallels with the conservation needs of cetaceans are obvious, although the SFA does not specifically apply to these species. ... [and] there is no reason why its standards should not be used as a guide to protection of marine biodiversity generally. However, much depends here on subsequent state practice in the IWC and its progress in cooperating to other conventions'. *Ibid* at 121-23.

impose their values on the rest of the world'.²⁵⁶⁵ This is much the same argument as is made in respect of indigenous hunting - or might that be separate, as 'non-commercial', and in fact the trade rules would keep it separate?

D.8.2 The WTO and environmental enforcement

Reeve writes that '[alt]hough not always popular with environmentalists, one of the best known and most effective dispute settlement mechanisms is the one that operates under the World Trade Organization (WTO) to settle disputes over breaches of the WTO agreements'.²⁵⁶⁶ She advises, however, that 'CITES has not been deterred in its use of trade sanctions by the establishment of the ... (WTO) in 1995 and the concurrent strengthening of the multilateral trading system (MTS)'.²⁵⁶⁷

According to Vogler, 'a gap [] exists between many of the environmental regimes []and the international trade regime centred upon the GATT rules and WTO'. He explains that 'radical political ecologists have argued that there is an absolute incompatibility between the trade regime and the preservation of the global commons'; with this incompatibility arising simply because the trade regime 'fuels the engine of economic growth which is the main instrument of environmental degradation'.²⁵⁶⁸ This, of course, is the charge that has been made against CITES; and which has caused the clash within the ICRW.

Reeve writes that 'CITES relies on a wide range of trade measures to achieve its objectives, which on the face of it, conflict with several GATT provisions, particularly those in Articles I, III and XI'.²⁵⁶⁹ She then explains that '[m]ost WTO members are also parties to CITES'; and that a 'challenge by a CITES party [to] a trade suspension seems unlikely, especially if the measure is based on a consensus of the Standing Committee (which, according to current practice, is usually the case)'. The question, she says, 'also arises as to who would be the respondent party, given that the WTO system is designed to resolve bilateral disputes'.²⁵⁷⁰ International treaty law is not helpful on this point, providing 'no clear answer as to whether CITES or the WTO would prevail'. It is true that, as Reeve says, the Vienna Convention on the Law of Treaties states that 'the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty',²⁵⁷¹ an expression of the principle of *lex posterior* (the later treaty will prevail). According to this scenario, she says, 'the 1994 WTO Agreement (which includes the GATT) would take precedence'. However, she goes on to explain that 'another principle of customary international law, *lex specialis*, provides that the more specific treaty, in this case CITES, would prevail'. In any case, as increasing numbers of countries join CITES, the risk of a non-party challenge is diminishing. Reeve records that, 'as of 1 January 2002, just 12 of the 144 WTO members were not party to CITES (one being the European Community, whose member states are all parties)'; and points out that 'only three of the 11 non-CITES-party WTO members have a notably significant trade - Taiwan, Solomon Islands and Haiti'.²⁵⁷²

²⁵⁶⁵ P Sands *Lawless World: Making and Breaking Global Rules* (2006 (2005)) at 95-96.

²⁵⁶⁶ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 18-19.

²⁵⁶⁷ *Ibid* at 298-99.

²⁵⁶⁸ J Vogler *The Global Commons: Environmental and Technological Governance* (2nd ed, 2000) at 218.

²⁵⁶⁹ R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 311. See

Annex A.

²⁵⁷⁰ *Ibid* at 313-14.

²⁵⁷¹ Article 30(3) of the Vienna Convention on the Law of Treaties, 1969

http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

²⁵⁷² R Reeve *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (2002) at 313-14.

D.9 The United Nations Environment Programme (UNEP)

D.9.1 UNEP's role

UNEP was, arguably, born at the same time as was the birth of the anti-whaling movement; stemming from a recommendation from the UN Economic and Social Council to the General Assembly that the UN Conference on the Human Environment (UNCHE) be held in Stockholm in 1972, and that this prepare the ground for a new environmental organ of the UN.²⁵⁷³ This happened; and then, on 15 December 1972, the UN General Assembly, with Resolutions 2997(XXVII) and 3004(XXVII) resolved that UNEP be created, with its headquarters in Nairobi, Kenya.²⁵⁷⁴

UNEP has an important role to play in driving and in supporting multilateral environmental treaties and programmes. It supplies the Secretariat to CITES; and it has long had linkages with the IWC, although it is not responsible in any way for the IWC Secretariat.

M'Gonigle writes of the 1970s that 'UNEP, with its continuing calls for a moratorium on commercial whaling, has been the leading IGO' in exerting pressure on the Commission indirectly. In addition, he says, 'to calling for an IWC moratorium on whaling, UNEP exercises its own authority to protect whales and maintains a lever against the Commission both independently and through its cooperation with FAO'.²⁵⁷⁵

The degree of influence seemingly implied by M'Gonigle is overstated. UNEP was certainly one of the drivers of the moratorium proposals of the 1970s; but today, while it maintains observer status at IWC meetings, it seems to have little real influence - at least, UNEP does not appear to have any more ability to influence the IWC than does any other IGO or NGO.

At IWC 34 in 1982, UNEP, as an observer, stated, on the question of the moratorium proposal, that 'UNEP continues to be guided by the recommendations of the United Nations Conference on the Human Environment, Stockholm 1972, and in particular recommendation 33, which explicitly refers to the conservation of whales through research etc., and seeks governments' support for the strengthening of the IWC'. UNEP also suggested that, in May 1982, 110 countries had met in Nairobi at a Session of a Special Character to commemorate the Stockholm Conference; and that the Session had concluded that it was of concern that, although progress had been made in regard to reducing whale catch quotas, the 'call for a ten year moratorium on commercial whaling has not been given effect' to.²⁵⁷⁶

D.9.2 Modern views

In an interview with Masa Nagai, UNEP Legal Officer,²⁵⁷⁷ the present writer asked about UNEP's role, and to comment on whether he sees the world as moving toward sustainable utilisation as a philosophy. 'UNEP', said Nagai has not in fact defined 'sustainable utilisation'; although, as a source, he indicated that UNEP's ex-Director, Klaus Toepfer,²⁵⁷⁸ has made statements which indicate UNEP's views on this. Basically, he explained, UNEP campaigns on the basis that what is good for environment is good

²⁵⁷³ D Kaniaru 'The Stockholm Conference and the Birth of the United Nations Environment Programme' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 3 at 4.

²⁵⁷⁴ *Ibid* at 21; S Kakakhel 'The Role of the United Nations Environment Programme in Promoting International Environmental Governance' in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 23 at 25.

²⁵⁷⁵ R M M'Gonigle 'The "Economizing" of Ecology: Why Big, Rare Whales Still Die' (1980) 9:1 *Ecology Law Quarterly* 119 at 196.

²⁵⁷⁶ United Nations Environment Programme Statement to the Thirty-Fourth Annual Meeting, IWC 'Opening Statements of the Thirty-Fourth Annual Meeting' (19-24 July 1982, Brighton).

²⁵⁷⁷ *Personal Communication*: interview with Masa Nagai, Pietermaritzburg, 5 July 2006; E Couzens.

²⁵⁷⁸ Former Executive Director of UNEP, 1998-2006. The current Executive Director is Achim Steiner.

for development. UNEP does, he said, believe that more value needs to be put into the environment; and that the environment has not ‘been mainstreamed in policy’.²⁵⁷⁹

Asked about UNEP’s interest in specific treaties, like CITES; Nagai commented that UNEP ‘[p]rovides the Secretariat for some conventions, such as [CITES and] the Rotterdam Convention’,²⁵⁸⁰ usually where this is requested by the body. Historically, he said, when negotiations are conducted they include ‘lots of influence from UNEP’ - environmental treaties being ‘based on science, UNEP’s work’ helps to form the contents of treaties. Treaties are, he pointed out however, intergovernmental in nature; and UNEP attends as an observer. He then explained that although UNEP has no right to give orders to COPs, parties often see UNEP as an expert and UNEP does try to influence policy - one way in which it is able to do this is through the UNEP World Conservation Centre²⁵⁸¹ which is influential on CITES and on the CMS; and also through assessment reports, the making of which are part of UNEP’s mandate. UNEP, he added, is ‘designed to influence policy’.²⁵⁸²

It has been suggested, though, that UNEP has generally made a significant contribution to facilitating discussions and negotiations on refocussing and reforming, as well as enlarging, the structure of international environmental governance.²⁵⁸³ Certainly, if there is to be a political resolution to any environmental problem engaging States today, UNEP is likely to play a role.

D.9.3 UNEP, the ICRW, CITES and the CBD

Asked about CITES, IWC and the apparent simple deadlocks between parties; Nagai suggested that there is more coherence on the CITES side - as it is a treaty designed with a major conservation area. He said that there has been development in the ‘sense that sustainable use is good for environment, so evolved’; and that the same thing has happened from a different angle in the IWC - which ‘eventually evolved’.²⁵⁸⁴ Asked whether this latter comment meant that he felt that the IWC has indeed changed; Nagai stated that ‘it has’, and that parties are ‘looking at it as a management tool’ rather than just from a use perspective. You cannot, he said, ‘just dismiss [the] sustainability issue’ and the ‘moratorium [is] linked to conservation issues’. The IWC therefore has a ‘different problem’ to CITES, which was ‘originally designed as a conservation treaty’; the sustainable use aspects of CITES coming ‘a bit later’. There are, he said, more developing countries in CITES - and therefore more views.²⁵⁸⁵

Asked about the role of the CBD, Nagai suggested that it is ‘very difficult to use one convention to convince others to change attitudes’. He did concede that the CBD COP *could* call on CITES, for example, to observe certain principles; especially as, ‘politically, senior governments attend both’ and so it might be possible.²⁵⁸⁶ Asked whether he meant the same people or the same principles, Nagai said that similar lobby groups attended both institutions; and were consistent on sustainable use.²⁵⁸⁷

²⁵⁷⁹ *Personal Communication*: interview with Masa Nagai, Pietermaritzburg, 5 July 2006; E Couzens.

²⁵⁸⁰ The Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous Chemicals and Pesticides in International Trade, 2005, see www.pic.int/.

²⁵⁸¹ Presumably the World Conservation Monitoring Centre (WCMC) in Cambridge, UK, is meant; see www.unep-wcmc.org/.

²⁵⁸² *Personal Communication*: interview with Masa Nagai, Pietermaritzburg, 5 July 2006; E Couzens.

²⁵⁸³ S Kakakhel ‘The Role of the United Nations Environment Programme in Promoting International Environmental Governance’ in M Berglund (ed) *International Environmental Law-making and Diplomacy Review 2005* (2006) 23 at 41. Shafqat Kakakhel being a former UN Assistant Secretary-General and Deputy Executive Director, UNEP.

²⁵⁸⁴ *Personal Communication*: interview with Masa Nagai, Pietermaritzburg, 5 July 2006; E Couzens.

²⁵⁸⁵ *Ibid.*

²⁵⁸⁶ *Ibid.*

²⁵⁸⁷ *Ibid.*

D.9.4 Recent events

Asked about the most recent ‘St Kitts and Nevis Declaration’, at the IWC in 2006, Nagai suggested that the Declaration ‘tried to *justify* the purpose of the ICRW itself’; focusing on ‘food security’. The pro-whaling countries, he added, ‘seem to need a lot of things to justify, so [there has been] evolution’.²⁵⁸⁸ Asked finally about the CBD and its conservation side, and about how it might be possible to end the deadlock within the IWC; Nagai said that ‘no one can ignore [the fact that] natural resources have a consumptive aspect’ and that there is ‘no short-term solution’. He then argued that there is a need to educate and inform the public, to make information available. He explained that when pictures of whaling are shown in Japan, the ‘young don’t want to see it - but older people do’; and that ‘public exposure [is] the best option for changing attitudes’. He concluded that the fisheries lobby in Japan is very strong, in support of parliamentarians; and that, ‘in government, agriculture and fisheries [are] always as strong as the environment’.²⁵⁸⁹

In 2006, at CITES SC-54, Elizabeth Maruma Mrema delivered a message on behalf of UNEP Executive Director Achim Steiner, in which he stressed UNEP’s commitment to supporting CITES and its efforts to improve services to all biodiversity-related conventions. Steiner further noted that CITES’ ‘move to list economically-valuable timber and fish species on its appendices demonstrates the importance of mainstreaming conservation’.²⁵⁹⁰ Steiner and Mrema then proceeded to discuss UNEP’s supportive role in regard to CITES.²⁵⁹¹

D.9.5 UNEP’s profile

UNEP has played a significant role in respect of both the IWC and CITES. In the early 1970s it was through UNEP that initial efforts to obtain a moratorium on commercial whaling were begun in the IWC; and in the early 1990s it was through UNEP that the CITES Secretariat was given a major shake-up.²⁵⁹² However, in more recent times, UNEP appears to be keeping a far lower profile.

D.10 Conclusion

It is very important that one not try to understand the ICRW and CITES, and their relationship, without also paying attention to other MEAs, even where Parties themselves deliberately avoid drawing such linkages. In this Chapter, examples were given of various MEAs, and UNEP, which have roles to play that affect the issues at hand. States Parties, it seems, flirt continually with linkages - when it suits them to associate themselves with other MEAs they will, only to withdraw when such linkage is seen as inconvenient. The Secretariats of both the IWC and CITES cooperate with each other, and with other MEAs, but usually this is at the level of supplying scientific information and taking observer status.

²⁵⁸⁸ *Ibid.*

²⁵⁸⁹ *Ibid.*

²⁵⁹⁰ International Institute for Sustainable Development ‘54th Meeting of the CITES Standing Committee’ *Earth Negotiations Bulletin Vol.21 No.50* 9 October 2006 <http://www.iisd.ca/cites/sc54/> (accessed 10 October 2006).

²⁵⁹¹ *Ibid.* It was reported that, ‘[p]resenting the report (SC54 Doc. 9.1 Rev.1), ... Mrema stressed UNEP’s role in fostering collaboration and synergy between MEAs. She highlighted several activities, including: development of issue-based modules for the coherent implementation of biodiversity-related conventions; organization of a workshop on harmonization of reporting among MEAs; strengthening of the Great Ape Survival Project (GRASP) Partnership; and work on examining the use of economic instruments to foster MEA implementation. She said [that] UNEP will allocate some funds from its 13% programme support cost received from CITES to the Convention’s activities such as the [MIKE] project’. *Ibid.*

²⁵⁹² See 3.2.1 on the IWC in the 1970s; and see 5.1.4 generally - in the aftermath of the 1989 Appendix I listing, UNEP unilaterally replaced Eugene Lapointe as Secretary-General of CITES in the wake of allegations by various NGOs that the CITES Secretariat had become too close to ivory traders.

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Personal articles in journals and chapters in collections of essays

NOTE: The following is a list of articles (relevant to the subject matter) which I have written and published in various books and journals in the decade during which I have been thinking/writing about the issues in the present thesis. I have taken the approach of not indicating specifically where I have drawn from these publications in the text of this thesis. However, I have ensured that all such instances have been properly referenced to their original sources, as per the earlier publications.

E Couzens 'The global conservation battleground' in *Thesaurus Acroasium Vol. XXXI 'Protection of the Environment for the New Millenium'* Thessaloniki: Institute of Public International Law and International Relations, 2002 621-637.

E Couzens 'The global conservation battleground' International Association for the Study of Common Property - Conference paper, 9th Biennial IASCP Conference, Victoria Falls, 17-21 June 2002, Digital Library, 2002 <http://dlc.dlib.indiana.edu/archive/00000809/>.

E Couzens 'The influence of English poaching laws on South African poaching laws' in (2003) 9 *Fundamina: A Journal of Legal History* 62-72.

E Couzens 'Two old watchdogs: CITES, the ICRW, the African elephant and the whale' in (2003) 10:2 *South African Journal of Environmental Law & Policy* 151-176.

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E Couzens 'The incorporation of international environmental law (and multilateral environmental agreements) into South African domestic law' in (2005) 30 *South African Yearbook of International Law* 128-147.

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E Couzens 'Only half a penguin a day: The early history of wildlife law in South Africa' *The exemplary scholar: Essays in honour of John Milton* Cape Town: Juta & Co Ltd, 2007 207-235.

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Official Reports and statements

Report of the Independent Inquiry into Whales and Whaling conducted by the Hon. Sir Sydney Frost: Volume 1
Canberra: Australian Government Publishing Service, 1978.

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K B Stansell ‘Testimony of Kenneth B Stansell, Assistant Director, International Affairs, United States Fish and Wildlife Service, Department of the Interior, before the House Resource Subcommittee on Fisheries Conservation, Wildlife and Oceans regarding the international aspects of fish and wildlife conservation’ 29 April 2004
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Draft Proposal 2, CITES COP 12 Workshop, Pretoria, 15 March 2002. The present writer attended this workshop.

Draft Proposal 3, Department of Environmental Affairs & Tourism CITES COP 12 Workshop, Pretoria, 15 March 2002. The present writer attended this workshop.

Final Draft of the Norms and Standards for Elephant Management, DEAT Stakeholder’s Workshop, SANBI, Pretoria, 10 November 2007. The present writer attended this workshop.

National Environmental Management: Biodiversity Act Threatened or Protected Species Regulations, R. 8638.
Available at <http://www.environment.gov.za/PolLeg/Legislation/2007Feb20/TOPS%20regulations%20-%20Final%20Doc%20Published%20Feb%202000.doc> (accessed 4 June 2008).

‘Policy Announcement by Marthinus van Schalkwyk, South African Minister of Environmental Affairs & Tourism, on the occasion of the publication of the final Norms & Standards for Elephant Management, Pretoria, 25 February 2008’ *DEAT* 25 February 2008 <http://www.environment.gov.za/HotIssues/2006/elephant/final%20-%20ens%20-%20short%20speech%20-%20ensr.pdf>.

‘South Africa welcomes the ivory sale go ahead by CITES’ Media Statement issued by the Department of Environmental Affairs and Tourism 16 July 2008.

Interviews

NOTE: I have not quoted in my text from all of the interviews which I conducted. This was due to space constraints, not because of the value of the interview - I learned much from every person whom I interviewed.

Bjørn-Hugo Bendiksen	Reine, Lofoten Islands, Norway; 26 April 2007. Current Head of the Norwegian Whalers' Union.
Dr Peter Best	Cape Town, RSA; 5 November 2006. Member of the IWC Scientific Committee for many years.
Dr Dorette Bloch	Torshavn, Faroe Islands; 30 April 2007. Director, Natural History Museum, Torshavn; whale researcher.
Prof Douglas Butterworth	Cape Town, RSA; 17 December 2006. Member of the IWC Scientific Committee for many years.
Dr Gregory Donovan	Impington, Cambridge; 1 February 2007. Head of Science at the IWC.
Turid Rodrigues Eusebio	Oslo, Norway; 23 April 2007. Deputy Director-General, Dept of Management of Marine Resources, Ministry of Foreign Affairs, Norway; Alt. Commissioner to the IWC for Norway..
Rune Frøvik	Reine, Lofoten Islands, Norway; 26 April 2007. Secretary of the High-North Alliance.
Prof Jeremy Firestone	Nairobi, Kenya; 6 October 2004. Marine Policy, University of Delaware, College of Marine and Earth Studies.
Dr Nicola Grandy	Impington, Cambridge; 1 February 2007. Secretary to the IWC.
Horst Kleinschmidt	Cape Town, RSA; 7 November 2006. Former Commissioner to the IWC for South Africa.
Esko Jaakola	Helsinki, Finland; 19 April 2007. Current Commissioner to the IWC for Finland.
Halvard Johannsen	Oslo, Norway; 23 April 2007. Deputy Director-General, Dept of Resource Management, Ministry of Fisheries, Norway; Alt. Commissioner to the IWC for Norway.
Donald Kaniaru	Joensuu, Finland; 30 August 2004. Advocate; Senior Legal Adviser to UNEP.
Maria Mbengashe	Pietermaritzburg, RSA, 29 June 2006. Chief Director: Biodiversity/Marine International Cooperation, DEAT, RSA.
Bjarni Mikkelsen	Torshavn, Faroes; 30 May 2007. Marine mammal researcher, Natural History Museum, Faroes.

Prof. Dr. Akio Morishima	Nairobi, Kenya; 7 October 2004. Founder of the environmental law programs of Sophia University. Laureate of the Elizabeth Haub Prize in Environmental Law, chair of the Environmental Council for the government of Japan.
Masa Nagai	Pietermaritzburg, RSA; 5 July 2006. Senior Legal Officer, UNEP.
Rachel Noble	London, UK; 6 February 2007. Campaigner; Elephants Project, Environmental Investigation Agency (EIA).
Justinus Olsen	Torshavn, Faroes; 1 May 2007. Veterinary surgeon; working on improving killing methods for pilot whales.
Herman Oosthuizen	Cape Town, RSA; 14 December 2006. Current Commissioner for South Africa to the IWC.
Clare Perry	London, UK; 6 February 2007. Senior Campaigner, Whales Project; Environmental Investigation Agency.
Mary Rice	London, UK; 6 February 2007. Campaigner; Elephants Project, Environmental Investigation Agency (EIA).
Nan Rice	Cape Town, RSA; 7 November 2006. Director; Dolphin Action and Protection Group.
Daphne Sheldrick	Nairobi, Kenya; 2 October 2004. Trustee, David Sheldrick Conservation Trust; elephant researcher.
Ólavur Sjúrðarberg	Leirvik, Faroes; 29 April 2007. Head of the Faroes Pilot Whalers' Association.
Minister Marthinus van Schalkwyk	Anchorage, USA; 30 May 2007. Current Minister of Environmental Affairs & Tourism, South Africa.
Professor Lars Walløe	Oslo, Norway; 24 April 2007. Norway's representative to the IWC Scientific Committee.
Captain Paul Watson	Anchorage, USA; 28 May 2007. Director; Sea Shepherd Conservation Society.
David Western	Nairobi, Kenya; 8 October 2004. Former Director of the Kenyan Wildlife Service; elephant researcher.

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Informal personal communications

NOTE: At points in the text I have acknowledged or quoted from persons with whom I had contact, although not by way of formal interview.

- Chobe Enclave Trust community** Chobe, Botswana; 19 June 2002.
Community meeting; field trip with the International Association for the Study of Common Property. See E Couzens 'Is Conservation a Viable Land Usage? Issues Surrounding the Sale of Ivory by Southern African Countries' in N J Chalifour, P Kameri-Mbote, L Heng Lye & J R Nolan (eds) *Land Use Law for Sustainable Development* (2007) 27 at 33.
- Michael Cowling** Professor, Dean of the Faculty of Law, University of KwaZulu-Natal.
Lecture given in June 2006 on the 3rd University of Joensuu/UNEP Course, hosted by the Faculty of Law, University of KwaZulu-Natal, Pietermaritzburg.
- Karsten Klepsvik** Anchorage, USA; 30 May 2007.
Current Commissioner to the IWC for Norway.
- Jennifer Lonsdale** Anchorage, USA; 31 May 2007.
Director; Environmental Investigation Agency (EIA).
- Les Manley** Anchorage, USA; 28-31 May 2007.
Acting Chief Director, Economic and Social Affairs, Department of Foreign Affairs, RSA.
- Ewan McIvor** Pietermaritzburg, on the 5th University of Joensuu/UNEP Course, hosted by the Faculty of Law, University of KwaZulu-Natal, Pietermaritzburg.
Senior Environmental Officer, Australian Antarctic Division.
- Benson ole Mutunkei & Ogeli ole Makui** Nairobi, Kenya; 6 October 2004.
Representatives; Kitengela Community Conservation Project, Kenya.
- Rosemary Rayfuse** Granada, Spain; 10th International Wildlife Law Conference, March 2008.
Professor, Faculty of Law, University of New South Wales.
- Jeremy Ridl** Attorney, RSA; formerly Associate Professor, Faculty of Law, University of KwaZulu-Natal, Durban.
- Peter Sand** Email from P H Sand to E Couzens, 16 September 2008.
Former Secretary-General of CITES.
- Bart Smithers** Cape Town, 4 November 2007.
Independent environmental documentary film-maker.

Treaty and arbitration texts

‘Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering’s sea and the preservation of fur seals’ *Reports of International Arbitral Awards Vol XXVIII* 263-276 (award 15 August 1893) http://untreaty.un.org/cod/riaa/cases/vol_XXVIII/263-276.pdf.

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